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No. 2376

United States
Circuit Court of Appeals
For the Ninth Circuit

DIAMOND PATENT COMPANY,
(a Corporation),

Appellant,

vs.

THE S. E. CARR COMPANY,
(a Corporation),

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for
the Eastern District of Washington,
Northern Division.

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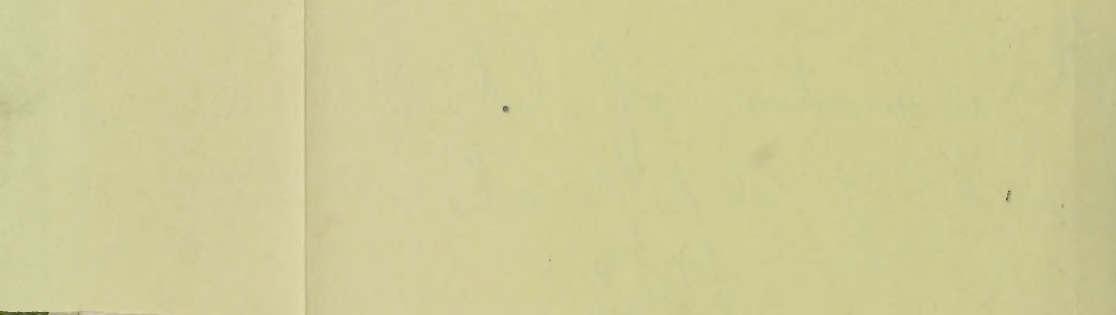
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F. D. MONCKTON,
CLERK

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FEB 9 - 1914

Records of U.S. Circuit
Court of appeals
863



No. **2376**

United States
Circuit Court of Appeals
For the Ninth Circuit

DIAMOND PATENT COMPANY,
(a Corporation),

Appellant,

v/s.

THE S. E. CARR COMPANY,
(a Corporation),

Appellee.

Transcript of Record

**Upon Appeal from the United States District Court for
the Eastern District of Washington,
Northern Division.**

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NAMES AND ADDRESSES OF SOLICITORS OF
RECORD.

SCRIVNER & MONTGOMERY,

Mechanics Institute Building, San Francisco, Cal., and

LUBY & PEARSON,

Hutton Building, Spokane, Washington,

Solicitors for Appellant.

MORRILL, CHESTER & SKUSE,

Peyton Building, Spokane, Washington, and

S. H. CUTTING,

Paulsen Building, Spokane, Washington,

Solicitors for Appellee.

DIAMOND PATENT COMPANY,

(a Corporation),

Complainant,

vs.

THE S. E. CARR COMPANY,

(a Corporation),

Respondent.

BILL OF COMPLAINT FOR INFRINGEMENT
OF A PATENT, INJUNCTION
AND ACCOUNTING.

To the Judges of the District Court of the United
States for the Eastern District of Washington,
Northern Division.

The Diamond Patent Company, your orator herein,
is a corporation duly organized and existing under
the laws of the State of California, and having its
principal place of business at the City and County of
San Francisco, and in the Northern District for State
of California, brings this, its bill of complaint, against

The S. E. Carr Company, a corporation, duly organized and existing under the laws of the State of Washington, respondent herein; and thereupon your orator complains and says:

I.

That heretofore and before the 3d day of October, 1904, one Fred Weber, was the original and first inventor of a certain new and useful improvement and invention in show cases, a more particular description of which will be found in the letters patent hereinafter referred to and to which special reference is hereby made, and in which letters patent the said invention is entitled "Show Case."

That the same was a new and useful invention and was not known to or used by others in this country before the invention thereof by the said Fred Weber, and was not patented or described in any printed publication in this or any foreign country before the invention thereof by the said Fred Weber, nor for more than two years prior to his hereinafter alleged application for a patent therefor, and at the time of his said application for a patent therefor had not been in public use nor on sale in the United States for more than two years and had not been abandoned.

II.

That thereafter, to-wit: on the 3 day of October, 1904, the said Fred Weber duly and regularly filed in the Patent office of the United States, an application praying for the issuance to him of letters patent for the said invention, and after proceedings duly and regularly had and taken, to-wit: on the 17th day of Oc-

tober, 1905, letters patent of the United States, bearing date on that day, and numbered 801,944, were granted, issued and delivered to the said Fred Weber, whereby there was granted to him, his heirs and assigns for the full term of seventeen years from the said last named day the sole and exclusive right and liberty to make, use and vend the said invention throughout the United States of America, and the territories thereof, and the said letters patent were issued in due form of law under the seal of the Patent Office of the United States, and signed by the Commissioner of Patents of the United States, and that prior to the issuance thereof, all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions, which said letters patent are hereby specially referred to for further and fuller description of the invention therein patented, and are ready in court to be produced by your orator, or a duly authenticated copy thereof.

III.

And your orator further shows unto your Honors that on or about the 5th day of February, 1910, the said Fred Weber, by an instrument in writing, sold, assigned and transferred unto your orator the said letters patent and all rights, liberties and privileges secured thereby, and that your orator thereby became and now is the sole and exclusive owner and holder, for and throughout all of the United States, and the territories thereof, of the said letters patent and of the invention, inventions, and improvements described therein, and of all rights, and privileges granted and secured or intended to be granted and secured thereby,

and your orator ever since has been and now is the owner of said patent.

And your orator further alleges that its said assignor and your orator since said assignment have invested and expended large sums of money in the manufacture of show cases under and in accordance with the said letters patent for the purpose of selling the same and making the said invention profitable and useful to the public; and that since the date of said assignment of said letters patent, your orator made and sold large numbers of such show cases throughout the United States, and is now actively engaged in the manufacture and sale thereof. That the said invention is of very great benefit and advantage, and that your orator has, upon all of the show cases so made and sold by him under said letters patent, fixed or caused to be fixed or marked thereupon the words "Patented," together with the day and year the said patent was granted, and the number thereof, thereby giving notice to the public at large that the said show cases were patented by the said letters patent. That the public have generally acknowledged and acquiesced in the aforesaid rights of your orator, and that but for the invasion of its rights by the respondent herein complained of, your orator would continue to enjoy large gains and profits from the practice of the said invention.

IV.

Your orator further shows to your Honors that notwithstanding the premises, but well knowing the same and well knowing the rights secured to your orator as aforesaid, and contriving to injure your orator and deprive it of the profits, benefits and ad-

vantages which might and otherwise would accrue to it from the said invention, and without the license or consent of your orator, and against the will of your orator, and in violation of his rights and in infringement of the said letters patent, and within six years last past, and within the Eastern District of Washington, the said respondent has made or caused to be made show cases employing, embodying and containing the said invention described in and covered by all the claims of said patent, but how many your orator is not advised.

Your orator further shows to your Honors that said respondent is now so continuing and threatens to continue to use show cases so as aforesaid infringing the said letters patent, and does now threaten and intend to further use show cases so as aforesaid infringing the said letters patent, all in defiance of the rights acquired by and secured to your orator as aforesaid, and to its great and irreparable loss and injury.

Your orator further shows to you Honors that the violation of your orator's rights as aforesaid by the said respondent and its threats and intentions to continue the same in disregard and defiance of your orator's said rights, has the effect to, and does induce others to venture to infringe the said patent in disregard of your orator's rights.

Your orator further shows to your Honors that it has caused notice to be given to the said respondent of its said infringements of the said letters patent and of the rights of your orator in the premises, and had notified it to desist and refrain therefrom, and that the respondent has disregarded the said notice and has

refused to desist from infringing the said letters patent, and as your orator is informed and believes is now continuing to use the same.

V.

Your orator further avers that it has always sought to maintain the sole and exclusive right to practice said invention and has never acquiesced in any infringement of its exclusive rights under said patent.

VI.

Your orator further shows to your Honors that by reason of the premises, your orator has suffered great and irreparable loss and injury and damage, and the said respondent has realized large profits and gains, the exact amount of which is unknown to your orator. That for the wrongs and injuries herein complained of your orator has no plain, speedy or adequate remedy at law; and for as much as it is without any remedy in the premises save in a court of equity where matters of this kind are properly cognizable and relievable, and to the end, therefore, that the said respondent may, if it can, show cause why your orator should not have the relief herein prayed for, and may (but not upon oath, and oath to the respondent's answer being hereby waived) according to the best and utmost of its knowledge, recollection, information and belief, full true, direct and perfect answer make to all and singular the matters and things hereinbefore charged; your orator prays that the said respondent may be decreed to account for and pay over to your orator the gains and profits realized by it from its unlawful use and practice of the invention patented in and by said letters patent, and, in addition to the profits to be accounted for,

as aforesaid, the damages sustained by your orator, together with the costs of suit.

May it please your Honors to grant unto your orator a writ of injunction out of and under the seal of this court, provisionally and until the final hearing, enjoining and restraining the said respondent, its officers, agents, employees, clerks and attorneys from making or using or selling any show case or device containing and embodying the invention patented in and by the said claims of letters patent, or either of the claims thereof; and your orator prays that upon the final hearing of the case, the said provisional injunction may be made perpetual; and your orator prays that it may have such other and further relief as the nature of the case may require, and to your Honors may seem meet and proper in accordance with equity and good conscience.

May it please your Honors to grant unto your orator a writ of subpoena directed to said respondent, the S. E. Carr Company, commanding it at a certain time and under a certain penalty therein to be limited, personally to be and appear before this honorable court, then and there to answer to this bill of complaint, and to stand to, perform and abide by such further orders, directions and decrees as to your Honors shall seem meet in the premises.

And your orators will ever pray, etc.

LUBY & PEARSON.

SCRIVNER & MONTGOMERY.

Solicitors for Complainant.

JOHN V. PEARSON

J. J. SCRIVNER,

Of Counsel for Complainant.

United States of America, Eastern District of
Washington, County of Spokane.—ss.

JAMES P. SHAFFER, being first duly sworn, deposes and says: That he is an officer, to-wit: President, of the Diamond Patent Company, a corporation, the complainant named in the foregoing bill of complaint; that he has read the bill of complaint and knows the contents thereof and that the same is true of his own knowledge except as to matters which are therein stated on his information and belief, and that as to those matters he believes it to be true.

JAMES P. SHAFFER,
President.

Subscribed and sworn to before me this 23d day of April, 1912.

(Seal) M. J. LUBY,
Notary Public in and for the State of Washington,
Residing at Spokane.

Endorsements: Bill of Complaint.

Filed in the U. S. District Court for the Eastern District of Washington, May 9, 1912.

W. H. HARE, Clerk.

By S. M. Russell, Deputy.

*United States District Court, For the Eastern District
of Washington, Northern Division.*

NO. 1365.

DIAMOND PATENT COMPANY (a Corporation),
Complainant,

U.S.

THE S. E. CARR COMPANY (a Corporation),
Respondent.

Answer of The S. E. Carr Company, a Coporation, to the Bill of Complaint.

This defendant reserving all manner of exceptions that may be had to the uncertainty and imperfection of the bill, comes and answers thereto, or to so much thereof, as it is advised is material to be answered, and says:

1.

It admits that it is a corporation duly organized and existing under the laws of the State of Washington, but whether complainant is a corporation duly organized and existing under the laws of the State of California respondent does not know and has no information, except as contained in the complaint, which it neither admits or denies.

2.

Respondent admits that on the 17th day of October, 1905, letters patent of the United States, bearing said date, and numbered 801,944, were granted to one Fred Weber for alleged improvement in show cases, but whether said patent was duly applied for and issued according to law, respondent does not know, and whether the complainant has acquired title to said patent or any interest therein, respondent does not know, and upon all and each of these matters the complainant is required to make proof.

3.

Further answering on information and belief, respondent denies that Fred Weber was the original and first inventor of the apparatus covered by said patent No. 801,944, and it avers that said apparatus and said

patent described, was not an invention when produced by said Fred Weber, and that it was not novel at that time, and that in the state of the art then existing it required not invention, but only mechanical skill to produce said apparatus and that the same when produced by said Fred Weber was not a patentable combination, but a mere aggregation.

4.

Further answering respondent on information and belief denies that said alleged invention was new and that it was not known and that it was not used by others before the alleged invention thereof by the said Fred Weber, but on the contrary alleges that the said alleged invention was in public use and on sale in this country more than two years before the said Fred Weber made any application for letters patent thereon, and that the said Fred Weber actually abandoned the said invention before any application was made.

5.

Respondent does not know whether said alleged invention had or had not been patented or described in any printed publication in this or any foreign country before the alleged invention thereof by the said Fred Weber prior to his application for patent therefor, and as to such matter, if deemed material, complainant is required to produce proof.

6.

Further answering on information and belief, respondent denies that complainant or its assignor have invested and expended large sums of money in the manufacture of show cases under and in accordance

with said letters patent for the purpose of selling same and making said alleged invention profitable and useful to the public, and further denies that complainant has made and sold large numbers of such show cases throughout the United States and denies that complainant is now actively engaged in the manufacture and sale thereof, and denies that said alleged invention is of very great benefit and advantage and denies that the validity of said patent, the assignment thereof, or the alleged right of complainant thereunder, have been generally recognized and acquiesced in, by the public and denies any invasion or profits arising therefrom of complainant's alleged rights under said patent, and likewise denies that it has ever deprived complainant of any gains or profits from the practise of said alleged invention.

7.

Further answering respondent denies that it has ever made or used any apparatus covered by said patent in said bill of complaint mentioned, and denies all infringement of said patent, and likewise denies that it ever derived any profit from such making or using and likewise denies that the complainant ever incurred any damage from any such transactions committed or caused to be committed by the respondent, in defiance of any rights acquired by and secured to complainant.

8.

Answering the Fifth paragraph of the bill of complaint herein, on information and belief, respondent denies that complainant has always sought to maintain the sole and exclusive right to practise said

alleged invention, and that it has not acquiesced in infringement of its alleged exclusive rights under said patent.

9.

Further answering, respondent says it is not true that complainant has not a plain and adequate remedy at law for the recovery of any damage or injury it may show it has sustained herein.

Having thus made full answer to all the matters and things contained in the bill, respondent prays to be dismissed hence with its costs in this incurred.

S. E. CARR COMPANY,
By MORRILL, CHESTER & SKUSE,

Its Attorneys,
745 Peyton Bldg., Spokane, Wn.

Endorsements: Service of the within answer is admitted this -- day of June, 1912, by acceptance of a copy thereof.

Answer. Attorneys for Complainant.

Filed in the U. S. District Court for the Eastern District of Washington, July 1, 1912.

W. H. HARE, Clerk.
By S. M. Russell, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

NO. 1365.

DIAMOND PATENT COMPANY, a Corporation,
Complainant,

vs.

THE S. E. CARR COMPANY, a Corporation,
Defendant.

REPLICATION.

Complainant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto says:

That it will aver and prove its said Bill of Complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this replicant, all of which matters and things this replicant is and will be ready to aver and prove as this Honorable Court shall direct, and humbly prays as in and by its said Bill of Complaint it has already prayed.

(Signed) LUBY & PEARSON,

Attorneys for Complainant,

(Signed) JOHN V. PEARSON and

SCRIVNER & MONTGOMERY,

Of Counsel.

Endorsements: Replication.

Due service and receipt of a true copy of within replication is hereby admitted this 12th day of September, 1912.

(Signed) MORRILL, CHESTER & SKUSE,

Attorneys for Defendant.

Filed July 12, 1912.

W. H. HARE, Clerk.

By S. M. Russell, Deputy.

14 *Diamond Patent Company, Appellant, vs.*
In the District Court of the United States, Eastern
District of Washington, Northern Division.

No. 1365.

DIAMOND PATENT COMPANY, a Corporation,
Complainant,

vs.

THE S. E. CARR COMPANY, a Corporation,
Defendant.

MOTION TO AMEND ANSWER.

Comes now the S. E. Carr Company, defendant in the above cause and moves the court for leave to file the following amendment to its answer filed in this cause, on the first day of July, 1912, to-wit; By adding after the first two words on the eighth line of the fourth paragraph of the second page of said answer, the following:

“That more than two years prior to the application of said Fred Weber for letters patent for the alleged invention, William J. Whitcomb, whose business address is southeast corner Eighteenth and Wyandott, Kansas City, Mo., and who resides at 506 Gladstone Boulevard, in said city, and George W. Whitcomb, whose residence is 3338 Peery Avenue, in Kansas City, Mo., manufactured and sold in the market in this country, the identical show case which is the subject of the alleged invention; that Warren J. Gurney, operating a jewelry store at 117 E. Eleventh Street, Kansas City, Mo., residing at 3211 Wayne Avenue, in said last named city; also William M. Federman, whose business address is 904 Main Street, in Kansas City, Mo., residing at 3119 Paseo Street, in said city; also

Soloman Kaufman, whose business address is 407 Gordon & Koppel Building, Kansas City, Mo., residing at 3204 Windsor Avenue, in said city; also H. J. Ernest, whose business address is 1720 E. Ninth Street, Kansas City, Mo., residing at 624 Highland Avenue, in said city and — — Ware, whose given name is to the defendant unknown, who resides in Kansas City, Mo., and whose exact address is likewise to defendant unknown, each and all, more than two years prior to said application by said Fred Weber for letters patent for said alleged invention, bought, owned and used, many of said show cases, in this country, which are identical with the show cases covered by said alleged invention and described in the application of said Fred Weber for letters patent and described in the patent mentioned and described in the bill of complaint in this case.”

That said amendment is material and necessary to a proper defense of this case, and that the matter set up by way of amendment, was not known to defendant prior to filing the original answer.

WHEREFORE, defendant prays that said amendment be allowed upon such terms and conditions as the court may prescribe, which terms and conditions defendant now accepts, and be considered as a part of the answer on the hearing of this cause.

(Signed) MORRILL, CHESTER & SKUSE
and S. H. CUTTING,

Attorneys for Defendant.

STATE OF WASHINGTON, }
County of Spokane. } ss.

S. E. Carr, after being first duly sworn on oath, deposes and says: That he is the president of the S. E. Carr Company, defendant in the above styled cause; that the foregoing motion is not vexatiously made, nor for delay; that the amendment contained therein is material and could not with reasonable diligence have been sooner introduced into the answer; that the names and residences of the parties therein named, and the manufacturing and sale and the purchase and use of the show cases mentioned therein, were not known to the defendant, until long after the filing of its answer herein, nor until the 12th day of September, 1912.

(Signed) S. E. CARR.

Subscribed and sworn to before me this 12th day of September, 1912.

(Signed) FRED B. MORRILL,
Notary Public for Washington, Residing at Spokane,
Washington.

(Seal)

Endorsements: Service of the within motion and amendment to answer is hereby admitted at Spokane, Wash., this — day of September, 1912.

Attorneys for Complainant.

Motion to Amend and Amendment to Answer.

Filed in the U. S. District Court for the Eastern
District of Washinton. September 13, 1912.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

The S. E. Carr Company, Appellee. 17
*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

NO. 1365.

DIAMOND PATENT COMPANY, a Corporation,
Complainant,

vs.

THE S. E. CARR, COMPANY, a Corporation,
Defendant.

ORDER GRANTING LEAVE TO AMEND ANSWER.

This cause coming on to be heard in chambers on motion of defendant to amend its answer and it appearing to the court that notice was served upon the plaintiff and it appeared not, and the court being fully advised of the amendment sought to be made to the answer of defendant heretofore filed in this cause on the 1st day of July, 1912, it is hereby,

ORDERED, ADJUDGED and DECREED, That the motion be granted and that the amendment as set forth in the motion be separately engrossed and the clerk of this court is hereby ordered to file the same as of the date of this order as an amendment to the original answer.

In Chambers September 16, 1912.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Order Granting Leave to Amend Answer.

Filed in the U. S. District Court for the Eastern District of Washington, September 16, 1912.

W. H. HARE, Clerk.
By S. M. Russell, Deputy.

18 *Diamond Patent Company, Appellant, vs.*
In the District Court of the United States, Eastern
District of Washington, Northern Division.

NO. 1365.

DIAMOND PATENT COMPANY, a Corporation,
Complainant,

vs.

THE S. E. CARR COMPANY, a Corporation.
Defendant.

STIPULATION.

It is hereby stipulated by and between the parties hereto that the defendant may amend its amended answer by inserting the words "to-wit: in Kansas City, Missouri," in the seventh line of the second page of Amendment to Defendant's Answer immediately following the words "many of said show cases, in this country" and that said amendment may be made by interlineation.

(Signed) LUBY & PEARSON.

(Signed) JOHN V. PEARSON, of Counsel.

Attorneys for Plaintiff.

(Signed) MORRILL, CHESTER & SKUSE,
and S. H. CUTTING.

Attorneys for Defendant.

(Signed) SCRIVNER & MONTGOMERY,

Solicitors for Complainant.

Endorsements: Stipulation Amending Answer.

Filed in the U. S. District Court for the Eastern
District of Washington, October 7, 1912.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

The S. E. Carr Company, Appellee. 19
*United States District Court for the Eastern District
of Washington, Northern Division.*

NO. ———

DIAMOND PATENT COMPANY, a Corporation,
Complainant,

vs.

S. E. CARR COMPANY, a Corporation,
Defendant.

AMENDMENT TO DEFENDANT'S ANSWER.

By leave of the court heretofore granted, defendant amends its answer filed herein on the 1st day of July, 1912, by adding after the first two words on the eighth line of the fourth paragraph of the second page of said answer, the following:

“That more than two years prior to the application of said Fred Weber for letters patent for the alleged invention, William J. Whitcomb, whose business address is southeast corner of Eighteenth and Wyandott, Kansas City, Mo., and who resides at 506 Gladstone Boulevard, in said city, and George W. Whitcomb, whose residence is 3338 Peery Avenue, in Kansas City, Mo., manufactured and sold in the market in this country, the identical show case which is the subject of the alleged invention; that Warren J. Gurney, operating a jewelry store at 117 E. Eleventh Street, Kansas City, Mo., residing at 3211 Wayne Avenue, in said last named city; also William M. Federman, whose business address is 904 Main Street, in Kansas City, Mo., residing at 3119 Paseo Street, in said city; also Soloman Kaufman, whose business address is 407 Gordon & Koppel Building, Kansas City, Mo., resid-

20 *Diamond Patent Company, Appellant, vs.*

ing at 3204 Windsor Avenue, in said city; also H. J. Ernst, whose business address is 1720 E. Ninth Street, Kansas City, Mo., residing at 624 Highland Avenue, in said city, and — — Ware, whose given name is to defendant unknown, who resides in Kansas City, Mo., and whose exact address is likewise to defendant unknown, each and all, more than two years prior to said application by said Fred Weber for letters patent for said alleged invention bought, owned and used, many of said show cases, in this country, to-wit: in Kansas City, Missouri, which are identical with the show case covered by said alleged invention and described in the application of said Fred Weber for letters patent and described in the patent mentioned and described in the bill of complaint in this case.”

(Signed) MORRILL, CHESTER & SKUSE,
and S. H. CUTTING.

Attorneys for Defendant, Suite 745 Peyton Bldg.,
Spokane, Wash.

Endorsements: Amendment to Defendant's Answer.

Filed in the U. S. District Court for the Eastern
District of Washington, September 16, 1912.

W. H. HARE, Clerk.

By S. M. Russell, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1365.

DIAMOND PATENT COMPANY, a Corporation,
Complainant,

vs.

THE S. E. CARR COMPANY, a Corporation,
Defendant.

STIPULATION.

It is hereby stipulated that plaintiff's replication now on file may stand as the replication to the amended answer filed herein.

Dated this 20th day of September, 1912.

(Signed) LUBY & PEARSON,
Attorneys for Plaintiff.

(Signed) MORRILL, CHESTER & SKUSE,
Attorneys for Defendant.

(Signed) SCRIVNER & MONTGOMERY.

By John V. Pearson, of Counsel for Complainant.

Endorsements: Stipulation.

Filed in the U. S. District Court for the Eastern District of Washington, September 12, 1912.

W .H. HARE, Clerk.

By S. M. Russell, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

NO. 1365.

DIAMOND PATENT COMPANY, a Corporation,
Plaintiff,

vs.

S. E. CARR COMPANY, a Corporation,
Defendant.

IN EQUITY.

CONDENSED STATEMENT OF THE TESTIMONY TAKEN IN THE ABOVE ENTITLED ACTION.

For the purpose of establishing its case the Counsel for the respective parties met at the office of J. H. PELLETIN on the 6th day of August, 1912, at the

hour of ten o'clock A. M., whereupon the following proceedings were had for and on behalf of the plaintiff, as appears from the report of said J. H. PELLETIN, the Commissioner appointed to take the testimony in the cause, which is as follows:

The examination of witnesses in the above entitled suit in equity was held, beginning on the 6th day of August, 1912, at the hour of 10 o'clock a. m. on behalf of the complainant, before me, a special examiner, duly appointed and authorized to administer oaths and to take and certify said depositions, at my office, 615 The Rookery Building, Spokane, Washington, in a certain suit now pending and entitled In the United States District Court, for the Eastern District of Washington, Northern Division, holding terms at Spokane, in the District Court aforesaid, wherein the above named Diamond Patent Company, a corporation, is complainant and The S. E. Carr Company, a corporation, is defendant, the complainant appearing by Scrivner & Montgomery, and Luby & Pearson, their counsel, and the defendant appearing by Messrs. Morrill, Chester & Skuse, and S. H. Cutting, Esq., their counsel:

That the following evidence and proceedings were had and taken, to-wit:

The complainant produced before the examiner the articles of incorporation of the complainant and exhibited the same to counsel for defendant, whereupon it was admitted by the defendant that the plaintiff was a corporation duly organized and existing, as alleged in the bill of complaint.

The complainant thereupon presented the original letters patent referred to in the bill of complaint and by consent of counsel for defendant was permitted to file, in lieu of the original, a copy thereof, which copy was admitted in evidence marked PLAINTIFF'S EXHIBIT A. ADMITTED.

Complainant thereupon produced the original assignment of said patent sued upon, from Fred Weber to the complainant, and by consent of counsel was permitted to file a copy thereof in lieu of the original, which original complainant's counsel was allowed to retain. Assignment admitted in evidence marked PLAINTIFF'S EXHIBIT B. ADMITTED.

In order to prove the alleged infringement, by stipulation of the respective counsel the complainant produced and filed a stipulation admitting the infringement as alleged in the complaint, which stipulation was admitted in evidence and marked PLAINTIFF'S EXHIBIT C. ADMITTED.

Complainant's counsel thereupon, to prove the averments of the complaint, of the marking of the show cases made under the plaintiff's patent produced one of the labels containing the date of the patent, as required by law, and Mr. J. J. Scrivner, one of counsel for complainant, was permitted to state as an officer of the court that he was familiar with the matter and knew of his own knowledge that these stamps were required to be placed upon all show cases made by or under the authority of the complainant and all of its licensees and representatives, which label was admitted in evidence marked PLAINTIFF'S EXHIBIT D. ADMITTED.

EXAMINER'S CERTIFICATE.

I, DO HEREBY CERTIFY that the foregoing evidence, and the whole thereof, was duly taken before me on the dates and at the places named in connection with the taking of said evidence; that during all the taking of said evidence the complainant appeared and was represented by Messrs. Scrivner & Montgomery, and Luby & Pearson, their counsel, and the defendant appeared and was represented by Messrs. Morrill, Chester & Skuse and S. H. Cutting, Esq., their attorneys; and I do further certify that the several exhibits which accompany this evidence were offered in evidence as noted therein, and in the report of the taking thereof.

WITNESS MY HAND, at Spokane, Washington, this 6th day of August, A. D. 1912.

(Signed) J. H. PELLETIN,
Examiner.

No. 801,944.

F. WEBER.
SHOW CASE.
APPLICATION FILED OCT. 3, 1904.

PATENTED OCT. 17, 1905.

Fig. 1.

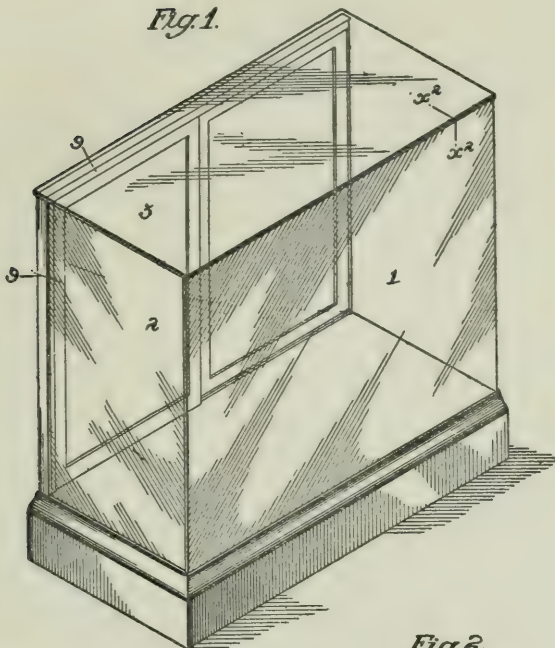


Fig. 3.

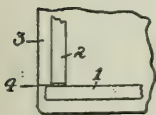


Fig. 4.

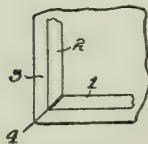


Fig. 2.

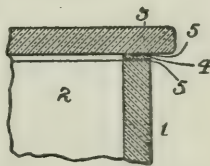
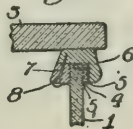


Fig. 5.



Witnesses:-
Frank L. A. Graham
J. T. Mackley

Inventor:
Fred Weber:

Townsend Bros.
attys.

UNITED STATES PATENT OFFICE.

FRED WEBER, OF LOS ANGELES, CALIFORNIA.

SHOW-CASE.

No. 801,944.

Specification of Letters Patent.

Patented Oct. 17, 1905.

Application filed October 3, 1904. Serial No. 228,682.

To all whom it may concern:

Be it known that I, FRED WEBER, a citizen of the United States, residing at Los Angeles, in the county of Los Angeles and State of California, have invented a new and useful Show-Case, of which the following is a specification.

This invention relates to improvements in glass show-cases; and the improvement resides particularly in the means for fastening one glass surface to another glass surface or to woodwork forming part of the case.

The object of the invention is to do away with drilling holes through the glass and to dispense with metallic or other fastening devices which are commonly used at the corners for holding the plates forming the case together and to provide a fastening which will unite the parts so securely that they cannot be separated except by such stresses or blows as would break the glass before accomplishing the dismemberment, although by the use of a proper tool the parts may easily be separated.

Another object is to provide for a certain amount of elasticity at the joint, whereby a cushion effect is produced. If the parts were rigidly united, severe shocks received by the show-case would tend to shatter the plates or displace the parts; but in the present invention the cushion-joint aids in maintaining the union of the parts, affording, as it does, an elastic or resilient joint, which eases the strain at the actual union or contact-faces of the plates, thereby also greatly softening the effects of shocks received by the case.

The accompanying drawings illustrate the invention, and, referring thereto, Figure 1 is a perspective view of a show-case the plates of which are fastened together with my improved means. Fig. 2 is an enlarged sectional view on line x^2x^2 , Fig. 1. Fig. 3 is a bottom plan of a corner, showing the manner of fastening the side plates to the top. Fig. 4 is a view similar to Fig. 3, illustrating a miter-joint. Fig. 5 is a sectional view illustrating the method of fastening glass plates with an intervening strip of molding.

The invention comprises in combination with the parts to be united, such as glass or other material having a vitreous surface, a strip of yielding material, such as felt, which is interposed between the adjacent faces to be united, each face of the yielding material having a coating of cement, which forms the

union between the yielding material and the surface of the adjacent part.

Referring particularly to Fig. 2, 1 designates the front plate. 2 is the side plate, and 3 is the top plate, resting upon the front and side plates with a strip of felt 4, which lies upon the top edge of the side plates 1 and 2, both top and bottom faces of the felt 4 having cement 5, which unites the plates to the felt. The cement is applied to the felt superficially, forming a skin, as it were, on both sides of the felt, the body of the felt thus retaining its natural state. If the cement were applied to the felt so as to permeate the same, by uniting with the felt it would form a hard practically homogeneous substance, thus destroying the resiliency of the felt. The cement should be applied to the felt when quite thick, so that it will not soak into the felt. Thus a laminated structure is produced comprising the two layers of cement, with an intervening layer of felt forming the yielding or resilient substance. Any desired form of cement may be used for this purpose, and yielding or resilient substances other than felt could be employed, which selections are obviously embraced in the scope of my invention.

In Fig. 3 the front plate 1 extends slightly beyond the outside face of the side plate 2, as shown, the top plate 3 preferably overhanging both the front and side plates, so as to give a neat finish to the case.

Fig. 4 shows the side plate 2 and front plate 1 united with a miter-joint with the intervening laminated felt and cement structure. This method gives a greater area of union between the front and side plates and in some cases may be preferred.

Fig. 5 shows a rabbeted molding 6, which rests upon the front plate 1, the top plate 3 resting upon the molding 6, the felt and cement structure being located between the molding and glass, as shown. A strip 7 extends along inside the plate 1, being fastened to the molding 6 by pins 8 or any other suitable means, the strip holding the plate 1 in place on the molding 6. This method of union permits easy assembling of the parts.

The construction shown in Fig. 5 enables thin glass to be used affording sufficient cementing area, the narrow thin edge alone not giving sufficient cementing area.

At the back of the case, where the glass

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plates fasten to the wooden structure 9, as shown in Fig. 1, the same fastening means, consisting of the laminated structure of felt and cement, is also employed with equally

5 good results.

The cement may be silvered, if desired, to give a neat appearance when seen through the glass, or it may be colored green, or any other color, green being preferred for both felt and

10 cement.

Parts which have been united in this manner cannot be separated without breaking the glass, except by running a sharp knife through the felt between the two layers of cement.

15 This feature is one of considerable value, inasmuch as it permits of easy removal of a plate when desired, as in altering the structure of the case or in making repairs when one or more of the glass plates become broken. The yield-

20 ing nature of the felt cushion absorbs the sharpness of shocks on the case and obviates breakage, which so frequently happens with all other forms of fastenings now known, particularly metallic corner-fastenings or struc-

25 tures in which a glass plate is grooved to receive the edge of another glass plate, which parts are united by cement at the groove, or show-cases in which the vertical glass plates are tightly fitted in grooved frames of wood

30 or other material. In the latter structures severe shocks imparted directly to the front or side plates will fracture them, as a side plate has no interresiliency with the front plate or top frame; but the present invention avoids

35 this difficulty, as there is interresiliency with both top and vertical plates which allows each plate to move relatively to the other, whether one plate alone is jarred or whether all plates are jarred simultaneously, so that each plate

40 vibrates its own degree, and direction. The effect of this is particularly noticeable at the corners formed by the junction of three plates—the top plate, a side plate, and front

plate—as at the corners referred to unless perfect cushioning of each plate is provided 45 a fracture is very likely to occur, resulting from the rigidity of the three-line joint and the unequal rate of vibration of the respective three plates and the conflicting directions or planes of vibration centering at one point, 50 and so far as I am aware I am the first inventor to provide a structure comprising glass plates arranged in three different planes, each plate meeting and joining the other two, with an intervening cushion between the joining 55 faces, to which cushion the glass plates are cemented.

What I claim is

1. A structure comprising a plurality of glass plates, the edges of which are spaced 60 from the adjacent plates, a felt cushion filling the space between the adjoining plates, the plates being cemented to the felt, each plate being adapted to freely vibrate in its natural plane of vibration, and prevented by the felt 65 cushion from imparting its vibration to the adjacent plates.

2. A structure comprising a plurality of glass plates, an unconfined edge of one plate nearly but not quite meeting another plate also 70 with unconfined adjacent edge, an elastic material filling the space thus existing between the nearest adjacent surfaces of the plates, said plates being attached to the elastic material, whereby the plates by reason of their 75 unconfined edges and the intervening elastic material can each vibrate or move in any direction independently.

In testimony whereof I have hereunto set my hand, at Los Angeles, California, this 24th 80 day of September, 1904.

FRED WEBER.

In presence of—

GEORGE T. HACKLEY,
FREDERICK S. LYON.

Whereas, I, Fred Weber, of Los Angeles, County of Los Angeles, State of California, did obtain letters patent of the United States for an improvement in show cases, which letters patent are numbered 801,944 and bear date the 17th day of October, in the year 1905; and whereas I am now the sole owner of said patent and of all rights under the same; and whereas the Diamond Patent Company, a corporation, duly organized under the laws of the State of California and having its principal place of business in the city and county of San Francisco, of said state, is desirous of acquiring the entire interest in the same;

Now, therefore, to all whom it may concern, be it known that, for and in consideration of the sum of One (1) Dollar to me in hand paid, the receipt of which is hereby acknowledged, I, the said Fred Weber, have sold, assigned, and transferred, and by these presents do sell, assign, and transfer unto the said corporation, the whole right, title, and interest in and to the said improvement in show cases and in and to the latters patent therefor aforesaid and to all rights of recovery for past infringements, the same to be held and enjoyed by the said corporation for its own use and behoof, and for the use and behoof of its legal representatives, to the full end of the term for which said letters patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made.

In testimony whereof I have hereunto set my hand and affixed my seal at Los Angeles, in the county of

Los Angeles, and State of California, this 5th day of February, 1910.

(DULY ACKNOWLEDGED)

(SEAL) (Signed) FRED WEBER.

The stipulation referred to is as follows:

In order to expedite the trial of this cause, and inasmuch as there is no genuine dispute as to the facts of the alleged infringement, the defendant, the S. E. Carr Company, hereby admits that prior to the filing of the complaint in this cause, the Pacific Scale and Show Case Company made for defendant's use and it is now using and intends to continue to use, in the Eastern District of Washington, Northern Division, and within the jurisdiction of this court, unless restrained by an injunction of this court, one or more show cases, made in substantial accordance with the claims, specifications and drawings of the letters patent sued on, to-wit: Letters Patent No. 801,944, dated October 17th, 1905, and which show cases are so being used by defendant for substantially the same purpose, object and result described in and covered by said patent.

(Signed) LUBY & PEARSON and

(Signed) SCRIVNER & MONTGOMERY,

Attorneys for Plaintiff.

(Signed) MORRILL, CHESTER & SKUSE,

Attorneys for Defendant.

Thereupon the plaintiff rested.

Thereafter, on the 24th day of October, pursuant to the notice set up in the answer and supplemental answer of the defendant, counsel for plaintiff and de-

Testimony of William G. Whitcomb.

defendant appeared before Genevieve Parlin, a Notary Public, in and for the County of Jackson, State of Missouri, who was selected and agreed upon by stipulation to take and report the testimony offered by the defendant (plaintiff being represented by Mr. J. J. Scrivner and the defendant by its counsel, Mr. A. L. Cooper); whereupon the following witnesses were examined and their testimony taken and reported, to-wit:

WILLIAM G. WHITCOMB, being duly sworn, testified; That he had resided in Kansas City, Missouri, for about thirty years, and that he was fifty years of age; that he was a cabinet maker by trade; that his firm name was: "Whitcomb Cabinet Company," which was a corporation, and that he was president thereof; that the corporation had been in existence about ten years, and that prior to that time his business had been carried on under the same name, as a partnership; that the business of the partnership and corporation had been the manufacture of store fixtures, bank fixtures, show cases, general cabinet work, and anything of that kind; that he had been in the shop almost continually, and had had practical experience as a mechanic in the making of show cases for about thirty years. "We made a regular line of show cases with mouldings, and then we made what we called 'all glass cases,' that is, without any moulding or wood across the front or ends, fastened with metal clips, and we made others with felt joints cemented, some with felt and some with rubber, and some with paste preparation—sort of a putty that we put in the joints.

"In 1899 and 1900 we put in a bunch of these cases

Testimony of William G. Whitcomb.

in Joplin, Missouri, for the Cooper Drug Company; there were ten of these Joplin cases. These Joplin cases had screws or bolts in the back corners and some of them one also in the middle. We also made some about the same time for Federmann, which were made substantially the same as the Joplin cases. The glass plates in these Joplin and Federmann cases were fastened together with a preparation that I made myself; it was not ordinary cement. I would go into a drug store and get the druggist to give me some drug and fix up some stuff and call it cement; I might have called it something else, but did not; I might have called it 'dog,' but didn't. These cases are all in existence yet. The glass plates in these Joplin cases were fastened together with a preparation I got up myself, and I called it 'cement.' I have not got any of it; it has to be used right away. The ones I put in recently have only been small jobs—individual cases. I have not fitted up any store with any great amount; didn't like to make them; didn't want to make them; talked a fellow out of them. If a fellow came in and wanted one case I would talk him out of it. My custom has been to advise people not to take them. When I made these Joplin cases I made up my mind that I didn't like the cases very well. I am willing for both sides to assume that the Federmann cases and the Joplin cases would be a fair representation of my idea of how I manufactured cases in 1898 and 1905, and along there. I don't think these all-glass show cases are a good, practical proposition—those that I have seen. I think a case in a frame is far better; I do not consider any

Testimony of William N. Federmann.

of them a success. The drug company cases at Joplin had felt joints; the other material used by me in making them was cement; I made it myself; it was a special material—something I worked out myself; naturally didn't publish it; it was a special preparation which I called 'cement.' It was a soft material—something like paint; we could pour it from one vessel to another. I suppose it would have a tendency to harden, naturally most anything would evaporate or harden. It permeated the felt at first, and then I got a felt that we had treated, waterproof. I can't think what we called it. You can take any piece of cloth and have the piece sort of water-proofed so as to cause your cement from soaking through."

Thereupon MR. WILLIAM N. FEDERMANN was sworn, examined and testified on behalf of defendant as follows:

"I have resided in Kansas City for twenty-five years; I have been engaged in the drug business for thirty years. I know Mr. Whitcomb. About April, 1900, I put four or five show cases up from the Whitcomb Cabinet Company, which are installed at No. 904 Main Street, Kansas City. It is here agreed, that the four or five Federmann cases were made substantially like the Cooper Drug Store cases, commonly known in this record as: 'The Joplin cases.' I think—so far as my impression and observation goes—the joints were solid tight joints; that the glue or cement, or whatever material was put in between the glass plates, made a solid joint, as I understand it, and that—according to my knowledge, information and observation

Testimony of Gustolf A. Hohm. and H. W. Jackson. —during all these years there is no elasticity in the joints at all; none that I know of. All the cases furnished me by Mr. Whitcomb (as heretofore testified) came with the bolts in the corners, as shown by the exhibit of the Joplin Drug Store Company's case on file in this cause, with the exception of some of them had bolts in the middle of the case along the back rail."

GUSTAV A. HOLM, being duly sworn, testified on behalf of the plaintiff, and stated as follows:

"I have repaired a number of the Whitcomb all-glass show cases; they were put together with some kind of a composition; I couldn't tell you what it is, but it seemed to be a very hard substance after it dried. It made a hard, solid joint. I do not know what kind of a paste or cement or glue or what it was; couldn't tell anything about it. I saw some rubber in some of the joints and some other substance there that must have been soft when it was put on; some kind of a paste."

H. W. JACKSON, being duly sworn, testified for the plaintiff, and stated as follows:

"I am a licensee of the plaintiff in this suit; I know the Whitcomb Company (an extensive manufacturer of show cases and all kinds of fixtures). I had a conversation with Mr. Whitcomb some four or five months ago about all-glass cemented show cases; he said they were no good; he denounced the cases as being no good on account of breakage that might occur in them, and the inaccessibility of the joints to be repaired; it was a hard matter to fix them when they got broken; he had found that his trade preferred to have the cases

Testimony of H. W. Jackson.

with clamps or with holes bored through the plates on account of the ease with which this kind of case could be repaired; also, that they could be shipped knocked down, which would be an impossibility in shipping a cement case, on account of its having to be shipped set up. I have been manufacturing the plaintiff's patented show case quite extensively; they have generally been very satisfactory to customers. All-glass cases can be shipped set up without any difficulty. The Weber patented show case has a frame work at the back over which the top glass rests; the back frame work is cemented to the glass like the front; the wood is cemented to the glass. We use a felt strip in there between the wood and the glass. I know of some of the all-glass cases made by the Whitcomb Company back in 1902 and 1903 and along there, and know how they are made. The glass cases: there were joints made to look like glue had been used, or some other substance; seemd to be very hard and chipped the under side of the top plate of glass and made them unsightly. We repaired two of them. The joints in the cases repaired by us were solid and rigid."

Thereafter, on or about the 20th day of January, 1913, before D. B. Richards, a Notary Public in and for the City and County of San Francisco, State of California, and by and pursuant to stipulation entered into by and between the parties in this suit, the following witnesses were duly sworn, and testified on behalf of plaintiff, as hereinafter stated, to-wit: Fred Weber, James P. Shaffer, William E. Price, and A. C. LaRue Shaffer.

Testimony of Fred Weber.

FRED WEBER was thereupon sworn and testified as follows:

"I am forty-one years of age and reside in Los Angeles, California. I am the Fred Weber mentioned in the Letters Patent No. 801,944, dated October 17th, 1905, which is the basis of this suit. I am familiar with the plaintiff's patent. I went into the show case business about 1901 or 1902, in Los Angeles. I started to experiment along somewhere about 1904 on an all-glass cemented show case, and after experimenting a few months found we could make a success with the case. We made quite a few cases; we took orders for cases, and in fact, shipped some of them, and found that they were a great success. Of course, as soon as I found that the cases would be a success, I applied for a patent and went into it deeper all the time and made a great number of cases. About 1909 we made a canvass on account of the high insurance rates; we found out the extent of the use of the cases. We went through our books and hunted up our customers to find out how many cases they had, how long they had them, and the extent of their breakage, and we had in all, approximately, fifteen thousand lineal feet, that was in 1909. And on the showing we made, that is the little breakage, we have shown the insurance companies that they could lower the insurance rate and still insure at a profit. The business grew to such an extent that I could not personally handle it any more in connection with my own business, and we sold the patent to the Diamond Patent Company of San Francisco, the plaintiff herein; this was in 1909. So far as

Testimony of James P. Schaffer.

I know, I was the first and original inventor of this device described in the patent. I have absolutely no trouble in repairing any cases. I have no trouble in setting them up. You can employ an inexperienced helper in that class of work. Never have had any trouble in breakage in shipping the cases. We formed an elastic cushion joint; that was one of the principal features of the case, because it could be repaired easy. I had seen show cases where the top plates were bolted onto the woodwork, making a solid joint; that was what I was endeavoring to get away from; I wanted an elastic joint, and I got it."

MR. JAMES P. SHAFFER was thereupon duly sworn, and testified as follows:

"My name is James P. Shaffer; I am thirty-one years of age, residing at San Francisco, California. I was one of the incorporators of the Diamond Patent Company, and am president of the company now. The company was incorporated in 1909. I am actively employed in the business of the corporation. The principal business of the corporation is licensing manufacturers to manufacture the article described as a 'show case' throughout the United States. The company owns the patent and licenses manufacturers, collecting the royalties. I am also connected with the Diamond Patent Show Case Company, which is also a corporation engaged in the manufacture of the patented show case under a license from the plaintiff. I know Mr. W. G. Whitcomb of Kansas City. About 1906, when myself and my brother determined to take over this show case business, I—in company with Mr. Wilson—

Testimony of William E. Price.

went east on the business. Among other places, we went to Kansas City and called on Mr. Whitcomb. Our object was to find a manufacturer in Kansas City to whom we could give a license to manufacture this case. We put the proposition up to them, that we had a cement all-glass show case on which we were licensing manufacturers under a royalty basis; we had a sample with us to show persons what the proposition was. Mr. Whitcomb, after examining the model, stated to us that he did not think we would find it a good proposition on account of the elasticity which we had in the joints, and he told me then and there, that he had tried cemented show cases, but had found them unsatisfactory; in fact, he said they were so unsatisfactory he was going to discontinue the manufacture of them, and then he went to his desk and brought forth a metal clamp, which is very commonly known in the show case business. We issued licenses to manufacturers in Salt Lake, Denver, Kansas City, Omaha, Des Moines, Indianapolis, Cincinnati, Columbus, Ohio; Pittsburg, Cleveland, Toledo, Detroit, Buffalo, Albany, Boston, Columbus, Georgia; New Orleans, and possibly some others. All of these licenses are still in existence. We have shipped cases as far as Manila, Philippine Islands, and Sydney, Australia, without any trouble."

WILLIAM E. PRICE was thereupon sworn and testified as follows:

"I am forty-seven years of age; in the drug business in Joplin, Missouri. I know Mr. W. G. Whitcomb, of Kansas City. I bought show cases of him; they are in the store there now. I remember the occasion of

Testimony of A. C. LaRue Shaffer.

getting them from Mr. Whitcomb; it was in the years 1899 or 1900; I got ten; they were shipped knocked down. Mr. Whitcomb came down from Kansas City and set them up. I helped him set up eight of the cases; the other two I put up myself after he left." Being asked how the cases were constructed, the witness said: "There was the base and back frame. We put the back frame in the base and the end glass in, then the front glass, then the top glass, and on the top of each glass, or edge of each glass, we put on felt and glue, and that is the way they were held together, and the back part of the case had bolts or screws fastened down tight; the back had felt along the back rail with no glue or cement; the glass plate on the back edge was bolted down to the wood without glue. The insurance companies refused to insure them while they had the bolts along the back rail. The material used in the bolts looked to me just like ordinary liquid glue; it was some material that Mr. Whitcomb brought with him."

A. C. LARUE SHAFFER, being first duly sworn, testified as follows:

"I am secretary of the Diamond Patent Company, also of the Diamond Patent Show Case Company; I am twenty-eight years of age, residing in San Francisco. I know the Weber patent. I know how the case described therein is made. Our cases have given satisfaction to the purchasers and users; never have had any complaint since we have commenced business. We have made about five hundred (500) lineal feet of show case per month since 1909; some months run

Testimony of A. C. LaRue Shaffer.

pretty high and other months different. I know Mr. W. G. Whitcomb, of Kansas City, Missouri. I examined the Federmann cases in Kansas City. I went to Federmann's store and examined the cases there; I think there was four cases there at the time, four or five. One of them, I think, was a wood frame and two of them the glass was held together with clamps, and two of them were held together with a substance such as glue, or similar substance; that is: the end plates were set and the front plate was held to the end plate with this substance, and the top plate was put on the top of the ends and front plate and back rail, and the back was held by a bolt running through the top plate into the back frame. There was no cement or glue or felt on the back rail. The top plate was held to the back frame by means of bolts, by boring a hole into the glass and running the bolt through the glass into the back frame. These cases were not constructed according to the description of the Weber patent.

"I know the Cooper Drug Company in Joplin. I went to examine some cases in the Cooper Drug Company. Mr. Whitcomb stated that he made some cases back there in 1900 or 1899, and I went down to investigate and see how they were made. He testified they were held together with glue and cement, nothing else being used to hold the case. Two of the cases which appeared to be in their original shape were held together with glue and felt with bolts through the top plate into the back frame to hold the top plate to the back frame. On these two cases there was a piece of felt, but no glue used, just bolts. In the cases—said to

Testimony of A. E. Edwards.

have been repaired—the bolts had been left out and they had strung a little glue here and there along the back frame to hold the top plate to the back frame instead of using bolts. I think it vital to use something in the joints that does not permeate the felt. If you permeate the felt it draws up and makes a hard joint, and that is what we avoid in the patent. Our patent covers an elastic joint; that is, when we make a case, we make it with an elastic joint. The Federmann cases are what I call solid joints all through, because the material used (I would call it 'glue') would permeate the felt and make a hard joint. Whatever material he used permeated the felt and bolts were used as before described. Three distinct differences between the Federmann case and the Weber patent case are: the solid joints; the use of the bolts, as above described, and the material used in the construction of the Federmann cases which (whatever it is) permeates the felt, making a solid jointed case, which was not the case in the patent. It was simply the process of putting these plates together with an elastic joint; that is the substance of the patent, as I understand it. The Joplin cases are the same composition as the Federmann, and my testimony with reference to the Federmann cases applies to the Joplin cases."

Thereafter, on the 2nd day of June, 1913, in Spokane County, State of Washington, A. E. EDWARDS was duly sworn and examined as a witness on behalf of the defendant, and stated and testified as follows:

"I am forty years old, by occupation a manufacturer, and residing in Spokane, Washington. I am a

Testimony of A. E. Edwards.

manufacturer in the firm of Pacific Scale & Show Case Company, a corporation engaged in the manufacture of show cases, manufacturing and selling show cases generally in the City of Spokane. My company manufactures the show cases used by the defendant in this suit. My experience in the manufacture of this kind of show case covers a period of about four years, and I have personally worked in the business. I am familiar with the ingredients that is used in cementing the cases together; it is a combination of drugs, oils, etc., making a cement so that it will work easily and is used in connection with felt. The first method in cementing glass to glass with a cushion between, is to glue the felt to the one light of glass, then spread the cement upon the felt, joining the next light of glass to it, and pressing or weighting down to form the union, spreading the cement through pressure to give it adhesive power, later cleaning surplus cement off the glass. I think when the proper kind of cement and felt are used—under the proper conditions—that it makes an ideal joint.”

The plaintiff hereby proposes the foregoing as its abstract of the testimony taken in the above entitled cause, prays that the same be allowed as settled by the court, pursuant to the provisions of Equity Rule No. 75.

(Signed) SCRIVNER & MONTGOMERY, and
LUBY & PEARSON.

Attorneys for Plaintiff.

Endorsements: Condensed Statement of Testimony
Proposed by Complainant.

Testimony of William G. Whitcomb.

Received at the Clerk's Office December 19, 1913,
and filed, after being settled by order of court, in the
District Court of the United States for the Eastern Dis-
trict of Washington, January 12, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington Northern Division.*

NO. 1365.

DIAMOND PATENT COMPANY, a Corporation,
Plaintiff,

vs.

S. E. CARR COMPANY, a Corporation,
Defendant.

IN EQUITY.

DEFENDANT'S PROPOSED AMENDMENTS TO
THE CONDENSED STATEMENT OF THE
TESTIMONY TAKEN IN THE ABOVE EN-
TITLED ACTION.

WILLIAM G. WHITCOMB, being duly sworn as
a witness on behalf of the defendant testified:

That the glass show cases where the plates were
connected with felt and cement which he made were
constructed by putting the cement along the edge of
the glass and then lay the felt on and then put cement
on top of the felt and then put the glass on; the pur-
pose of the cement was to hold the case together; that
he made a good many of these cases from 1898 to
1905 and still makes a few of them; that the first one

Testimony of William G. Whitcomb.

of these cases that he sold was to H. J. Ernest, in 1899; that the case sold to Ernest was made with the felt stuck to the edge of the end glass and then put cement on the felt and simply put up the front glass and the same thing with the top, the back of the case was frame; there was cement and felt on the top but not at the back corner; the back edge of the glass laid in a rabbet in the wood frame; the front, top and end joints were put together with felt and cement clear along the edges; that Mr. Ernest paid for the case and used it several years; that he made five of these cases for Mr. Federmann, constructed with felt and cement the same as the Ernest case; these cases were delivered to Mr. Federmann in April, 1900, and he has them yet, two or three broken tops have been replaced and some of them have never been repaired; that in some of these elastic cases made with the felt and cement construction he bored holes through the top glass at the back top corners and put a screw through the holes and into the back wood frame, some of them were made without these screws, the two end joints and front joints and the front corners where the glass is put together did not have any holes and were held together by the cement; that he began experimenting with these felt joint cases in 1896 or 1897; that he made several of these cases before selling any, and first tried using glue for the adhesive substance to adhere the felt to the glass and found out glue would not do as it broke and chipped the glass, then he tried shellac and found that would not work and finally he used a substance made up of ingredients that he would get at

Testimony of William G. Whitcomb.

a drug store; that a Mr. Shaffer called on him a few years ago to sell him a license to make cemented all-glass cases; that he told him he was the first to make all-glass cemented show cases; that the right to make all-glass cemented cases belonged to him if it belonged to anybody.

That the Federmann cases were made by sticking the felt to the glass and then put cement on the other side of the felt and lay the glass on; that he had no more trouble from this class of cases coming apart than from others. That during November, 1899, he constructed and installed ten of these cases for the Cooper Drug Company at Joplin, Missouri; that these Joplin cases were constructed with felt in the joints between the glass with an adhesive substance on either side of the felt adhering it to the glass; that the cement used in those cases was a preparation he got up himself; that he used felt in the joints of these all-glass cemented cases, for the vibration of the case, that he made some without the felt, simply stuck one plate of glass on the other plate and found it was so solid any little jar would break it, then he thought of the felt to give the elastic movement and make an elastic joint; that the joints in the Federmann cases and all those are not hard and fixed. they appear to be solid, but there must be some give to them or they would break; that his trouble with the first ones he made was that the joints were solid and he could not handle them, they would break without anyone touching them; but later I got so I shipped them all set up; that the Ft. Scott cases were set up in his factory and shipped down there

Testimony of William N. Federmann.

all complete; that his idea was to get an elastic joint, something that would give a little and he succeeded; that as compared with a wood frame case he does not think any all-glass show case is a good, practical success; that the cases are good or bad by comparison with a wood frame case and he does not consider them as good, some give satisfaction, but some people are not satisfied with them; that he tells people that the wood frame case is the best. That sometimes people accustomed to wood frame cases would complain that these cases looked frail and would ask to have screws put through the back edge of the top plate of glass down into the wood frame; that he built some of them that way and some of them without such screws, that probably most of them were made without screws. That one of the objects of using felt in the joints between the glass was to give flexibility and elasticity to the joints and obtain sort of a rubber or cushion effect between the plates of glass. That he remembers the construction of the ten cases delivered to the Cooper Drug Company at Joplin, Missouri, very well as he went down and set them up and worked on them at night; that the joints were made with felt and cement, cement on the edge of the glass and then felt and then cement and the glass laid on; that he made the cement himself.

WILLIAM N. FEDERMANN, being duly sworn as a witness on behalf of the defendant, testified:

That in April, 1900, he received five show cases made by Whitcomb and that they were installed in his store at 904 Main Street, Kansas City, Missouri, and

Testimony of Gustav A. Holm.

that said cases have been used by him ever since and are now being used by him at the same location; that said cases were made with felt between the glass and fastened together with some adhesive substance; that three of the cases are still in their original condition and have not been broken or repaired; that the strips of green felt are still there on the edges of the glass and can be seen readily; that the top plate has been broken on a couple of the cases and the fragments removed and new tops put on and in the repairs clamps were put on the corners; that said cases have been in continuous use ever since they were installed in 1900 and are in fair condition and have been satisfactory; that whatever elasticity followed from the use of felt in the joints between the glass existed in his cases; that said cases were made by putting a strip of felt having an adhesive substance on either side of it in the joints between the glass and the different plates of glass thus held together and that any elasticity resulting from that method of construction existed in said cases; that in saying that the joints were solid he meant that they were not loose and open, but were firm with the felt intervening with no opening to allow dust to enter or anything of that kind; that these cases have a bolt or screw through the glass into the wood frame at the rear top corners.

GUSTAV A. HOLM, being duly sworn as a witness in rebuttal on behalf of the plaintiff, testified:

That he repaired four or five show cases made by the Whitcomb Cabinet Company for Sol Kaufman; that they were all-glass cases, that is, they had no

Testimony of Henry W. Jackson.

wood around the glass; that the glass was adhered together at the joints by material; that he repaired these Kaufman cases within the last two years; that the glass joints of these cases were fastened together by some adhesive substance serving the purpose of cement with a strip of gray rubber running the whole length of the joints between the glass; that he did not examine the rubber to see whether it was soft and elastic or not; that in repairing these cases he did not need to disturb the end plates of glass; that he simply put cement on the edge of the end plates and then put on a strip of felt and then put on some more cement and then put on the front plate of glass and then do the same way with the top plate of glass; that the difference in the way he repaired them from what they were before was that he used felt instead of the rubber that had been used in the first instance and any difference there was in the cement; that the cement he used was obtained from the Diamond Patent Company; that he is employed by the licensee of the Diamond Patent Company in Kansas City, Missouri, one of the competitors of the Whitcomb Cabinet Company in said city.

HENRY W. JACKSON, being duly sworn as a witness in rebuttal on behalf of the plaintiff, testified:

That he is secretary of the Kansas City Show Case Works Company, licensee of the plaintiff herein and competitor of the Whitcomb Cabinet Company; that he has been making the plaintiff's patented show case under said license; that he knew without being told that Mr. Whitcomb had been making these all-glass

Testimony of Fred Weber.

show cases, as he had seen such cases made by Whitcomb running back a dozen or thirteen years ago and knew two or three places where Whitcomb had put in the cement felt, all-glass show cases; that all these all-glass cases have a wooden back frame and base; that the conversation he had with Mr. Whitcomb, as testified to, took place when they were competitive bidders on a job of work; that he repaired some all-glass cases made by Whitcomb along 1901, 1902 or 1903 and besides the paste or glue there was some material in the joints that looked like rubber; that the cases had been used four, five or six years when he repaired them; that Federmann's was the next place where he knew of Whitcomb putting in all-glass show cases; that the cement he uses in making these cases he obtains from the plaintiff and he does not know the composition of it; that his license requires him to buy the cement of plaintiff; that he never used cement in the show case business until he began making plaintiff's patented show case; that the cement he gets from plaintiff is the first flexible cement he knew of; that this cement he uses gets a little hard and is flexible and has some adhesive property in it.

FRED WEBER, a witness in rebuttal on behalf of the plaintiff, being duly sworn, testified:

That before testifying he had read the testimony of Mr. Whitcomb; that he constructs the patented show case by setting the end plates in putty in the grooves in the wood frame at the back and bottom and then apply a coat of cement on the front edge of the end plates and then apply a strip of felt on the edge of

Testimony of Fred Weber.

the end plates and then a layer of cement over the felt and then put up the front plate and then go through the same process on the top edge of the end plates and front plate and then put on the top plate; that the claims of the patent are a correct statement of the device as he made it; that he went into the show case business along in March, 1902, and began experimenting with the patented show case along in 1904; that when he testified that in 1909 he had sold 15,000 lineal feet of these show cases he meant that many feet reduced to one year's usage; that some of the cases had then been used several years and the number of actual feet was multiplied by the number of years usage; that damp weather has something to do with how long it takes the cement to harden, sometimes the cement will dry in four or five hours and then again will not hardly dry in a day and a half; that the cement gets a pretty good hold of the felt, but is not supposed to permeate the felt; that to the extent the cement does permeate the felt he escapes the elastic joint; that he never used rubber instead of the felt, but presumes that if a strip of rubber about the thickness of the felt was used, the same result would be obtained; that in the patented cases they set the back and bottom of the end plates and the bottom of the front in putty in a rabbet in the wooden frame work and the putty hardens in time and they get a pretty firm, rigid joint as rigid as putty will make it; that the elastic joint feature applies simply to the all-glass construction; that in the patented cases they have an elastic joint on one side and one end of the

Testimony of James P. Schaffer.

end plates and a rigid joint on one side and one end of the end plates; that it is the result they seek and he presumes any composition of ingredients that was an even color and consistency, which would set at a certain time and not too quick would be as satisfactory as their cement; that he is now making these patented cases as licensee from the present owner and his assignment of the patent was under terms whereby the more of these cases there are made the greater his compensation for the patent.

JAMES P. SHAFFER, at witness in rebuttal on behalf of the plaintiff, being duly sworn, testified:

That during his interview with Mr. Whitcomb in November, 1906, he showed Mr. Whitcomb a sample of the patented show case construction and Mr. Whitcomb told him "he had tried the cemented show cases" and intended using the metal clip instead and also stated "that from the fact that he had tried them out and found them unsatisfactory, that he would not be bothered with them any more"; that he stated nothing more than "that he had made the case" and that our case "had too much elasticity in the joint"; that he had read the testimony of Mr. Whitcomb; that he gets a salary from the plaintiff company and from one of its licensees; that at his interview with Mr. Whitcomb in 1906 the latter examined the sample of the patented construction pretty thoroughly and said there was too much elasticity in the joints; that there was too much give and take and I think his objection to taking it up was "principally on the fact he had tried them himself and found them unsatisfactory, and he didn't want

Testimony of William E. Price.

to try twice," he seemed to concede that you wanted some elasticity, but that we had too much, he thought we were overdoing the elasticity feature; we explained to him in considerable detail the construction of our patented case and there was not any question about his knowing how it was constructed, he did not indicate when he had made the cases, but "just simply stated that he had made them"; that the only cemented show case he talked about was the corner of the one we had there and he stated" he had made some himself."

WILLIAM E. PRICE, a witness in rebuttal on behalf of the plaintiff, being duly sworn, testified:

That he was one of the partners in the co-partnership known as Cooper Drug Company at Joplin, Missouri; that the ten cases which said company purchased of the Whitcomb Cabinet Company in 1899 or 1900 were constructed at the back top joint by putting a strip of felt on the wood which the top plate of glass laid upon and then two screws were put through holes in the glass, one at each back top corner down into the wood frame; the ten-foot cases had three screws through the rear edge of the top plate of glass, one at each end and one in the center, these screws or bolts were put in with a screw driver and they had big washers around the head; that he was not sure about the underside of the washers being lined with felt; that said cases were shipped to Joplin knocked down and were set up in the store by Mr. Whitcomb and himself; the back frame was separate from the base; that they screwed the back frame onto the base and then set the end plates of glass in grooves in the base and back frame then

Testimony of William E. Price.

they put glue on the edge of these end plates of glass and then put on a strip of felt over the glue and then put glue on the felt and then put on the front plate of glass and then did the same with the top plate of glass; that the adhesive substance which they used and which he calls glue was brought along by Mr. Whitcomb; that he set up two of the cases alone after Mr. Whitcomb returned to Kansas City; that all these cases are still in use in the store where they were installed and have been in continuous use ever since installation; that the top plates of glass have been broken on eight of these cases and new tops put on; that two of the cases are still just as they were first set up and have not been changed or repaired; that he has personally used these cases all the time until just before testifying; that this glue, felt and glue construction in these cases ran along the top end joints, down the front end joints and the top front joint; that he has broken the top plates of these cases a good many times without breaking the other plates of glass, just the top plates would break and the other plates not break at all; that these are the only show cases he has had in his store since they were put in; that when the top plates of glass would get broken he would take a thin knife blade right under the glass, sometimes add a little hot water and sometimes without it—run the blade right along there through the felt and pull it off, it is not a very difficult process and some plates would skin right off.

Testimony of Wm. C. H. Wilson and A. C. LaRue Shaffer.

WILLIAM C. H. WILSON, a witness in rebuttal on behalf of the plaintiff, being duly sworn, testified:

That he was with Mr. Shaffer when the latter called on Mr. Whitcomb at Kansas City with a view of selling him a license to make the patented show cases; that said call was made November 22, 1906; that Mr. Whitcomb told them he had made cemented show cases, and did not care to handle their proposition; that in June, 1909, he again called on Mr. Whitcomb when he was hunting up infringers for the holders of this patent; that he learned of the Federman cases and went down and examined them; that on both trips when he called on Mr. Whitcomb he was in the employ of the owners of this patent; that Mr. Whitcomb examined the sample of their construction which they had; that he does not recall Mr. Whitcomb telling them that he had been making those show cases before they did; that these Federman cases were constructed with "some adhesive substance on either side of the felt."

A. C. LARUE SHAFFER, a witness in rebuttal on behalf of the plaintiff, being duly sworn, testified:

That the plaintiff company has about twenty-five licensees throughout the United States making show cases in accordance with the patented construction; that they all pay license and royalty fees to plaintiff; that he is also interested in the Diamond Patent Show Case Company of San Francisco, which is a licensee of plaintiff; that he was present and heard Mr. Whitcomb testify in this case; that he examined the Federman cases in Kansas City; there was felt on the back rail

Testimony of C. LaRue Shaffer.

of these Federman cases, whether felt was used in all the joints he does not know; that after Mr. Whitcomb's testimony he examined the Cooper Drug Company cases at Joplin, Missouri, and interviewed the witness, Mr. Price, who was manager of the drug company; that he found the Cooper cases were made at the joints with glue and felt, except at the back rail where there was felt but no glue; that two of the cases appeared to be in their original condition; that he has a stock interest in both companies and gets a salary from each and has an agreement whereby he gets something in addition to both; that his inspection of the Federman cases was in October, 1912; that some of these Federman cases had bolts through the top plate of glass at the back corners, one bolt in each corner, they had inserted a sort of bolt with a rubber washer on it down into the back frame; that the balance of the case from the bottom to the front of the top corners and across the front on top and across the top of the ends, he thinks, was constructed with felt and glue; that he calls it glue from the way it seems to act on the glass; that the Federman cases are identical with the patent except that the Federman cases have bolts through the rear corners of the top plate of glass, and that they are made with what I call glue, rather than what I call cement, and that I claim that the adhesive substance used in the Federman cases permeated the felt; that aside from those three things, the bolt is one thing, he did not use what I call cement, but did use what I call glue and as I claim the glue has permeated the felt, the cases are like the patented cases;

Testimony of C. LaRue Shaffer.

that he does not claim the patent covers the plates, the back and so forth, but simply the process of putting these plates together with an elastic joint; that the Joplin cases are the same as the Federman cases; that the cement which they used in constructing the patented show cases and which the licensees are required to purchase from plaintiff is simply a composition of ingredients that they know about and which they have made up for them; that he does not claim any patent on the cement; that the patent covers uniting two plates of glass, with some adhesive substance and a cushion between; that some of the Federman cases had clamps on them that had been put on in repairs.

That plaintiff's Exhibit 1, being an alleged model submitted by plaintiff of the show cases in controversy, and plaintiff's Exhibit 2, being an alleged model submitted by plaintiff of the anticipating show cases manufactured by William G. Whitcomb and referred to in the testimony as the Federman and Cooper show cases, be made a part of the record in this cause, and transmitted as such record to the Clerk of the United States Circuit Court of Appeals for consideration by said Court in the consideration of this case.

The defendant hereby proposes the foregoing as its abstract of the testimony taken in the above entitled cause and asks that the same be allowed by the Court in accordance with the governing rules.

(Signed) MORRILL, CHESTER & SKUSE,
and S. H. CUTTING.

Attorneys for Defendant.

Endorsements: Defendant's proposed amendments to the condensed statement of the testimony proposed by complainant.

Received at the Clerk's Office December 31, 1913, and filed, after being settled and allowed by the Court, in the U. S. District Court for the Eastern District of Washington, January 12, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

NO. 1365.—IN EQUITY.

DIAMOND PATENT COMPANY, a Corporation,
Plaintiff,

vs.

S. E. CARR COMPANY, a Corporation,
Defendant.

STIPULATION.

It is hereby stipulated and agreed by and between the parties to this action that the proposed condensed statement of the evidence lodged by the plaintiff with the clerk shall be amended as follows:

On page 5, the clause: "I am willing for both sides to assume that the Federmann cases and the Joplin cases would be a fair representation of my idea of how I manufactured cases in 1898 to 1905, and along there"; be substituted for the clause of similar wording, referring to the years 1899 to 1900;

And that the defendant's proposed amendments to said condensed statement of the evidence lodged with the clerk be amended as follows:

That all of page 1, except the title, be stricken out, because covered and included in plaintiff's statement.

And that upon being so amended said proposed statements shall be treated and considered as true, complete and properly prepared, and may be approved by the court, and filed as a part of the record for the purposes of appeal.

(Signed) SCRIVNER & MONTGOMERY, and
LUBY & PEARSON

Attorneys for Plaintiff.

(Signed) MORRILL, CHESTER & SKUSE,
and S. H. CUTTING,

Attorneys for Defendant.

Endorsements: Stipulation.

Filed in the U. S. District Court for the Eastern District of Washington, January 12, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

NO. 1365.—IN EQUITY.

DIAMOND PATENT COMPANY, a Corporation,
Plaintiff,

vs.

S. E. CARR COMPANY, a Corporation,

Defendant.

ORDER APPROVING CONDENSED STATE-
MENT OF EVIDENCE.

Upon motion of Messrs. Luby & Pearson and Messrs. Scrivner & Montgomery, counsel for plaintiff, and on

filing the stipulation of the parties, it appearing to the court that the statement of evidence as proposed and amended, pursuant to such stipulation, is true, complete and properly prepared.

IT IS ORDERED, That said statement be and the same hereby is approved, and it is directed that the same be filed in the Clerk's office of this court and become part of the record for the purpose of appeal.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Order Approving Condensed Statement of Facts.

Filed in the U. S. District Court for the Eastern District of Washington, January 12, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

NO. 1365.

DIAMOND PATENT COMPANY, a Corporation,
Plaintiff,

vs.

S. E. CARR COMPANY, a Corporation,
Defendant.

OPINION.

Luby & Pearson and Scrivner & Montgomery, for plaintiff.

Morrill, Chester & Skuse and S. H. Cutting, for defendant.

RUDKIN, District Judge. This is a suit in equity

to enjoin the infringement of Letters Patent No. 801,944 for a show case, issued under date of October 17, 1905, to Fred Weber of California, and later assigned to the plaintiff. The infringement is admitted, and while the testimony and briefs in the case cover a wide range, the facts so far as deemed material were agreed upon at the final hearing and are as follows:

Show cases manufactured by William J. Whitcomb of Kansas City, Missouri, were in public use and on sale for more than two years prior to the application for the Weber patent. The base and back frame work of the Whitcomb cases were made of wood, while the ends, front and top were of plate glass. The two end plates were imbedded in the wooden base and in the wooden frame work at the rear. The front plate was likewise imbedded in the wooden base and cemented to the end plates with a strip of felt between the plates and the joint. The top plate was cemented to the front end and plates in the same manner and fastened to the wooden frame work at the rear by means of metal screws inserted through holes drilled in the glass at each rear corner of the eight-foot cases with an additional screw in the center of the ten-foot cases. A strip of felt was placed between the plate glass and the wood at the rear of the case.

The cases manufactured under the Weber patent are in all respects similar to the Whitcomb cases with the single exception that cement is substituted for metal screws for the purpose of fastening down the rear of the top plate. In other words, in the Weber case the top plate is cemented to the wooden frame

work at the rear just as glass is cemented in other parts of the case while metal screws are used to hold the rear of the top plate of the Whitcomb case in place.

Under the foregoing facts the defense of prior use or anticipation is the only question I deem it necessary to discuss or consider. In my opinion the Weber patent must fail for two reasons. First, because the mode of fastening or joining glass to wood is not covered by the claim in the Weber application; and, second, if it were, I do not think that the mere substitution of cement for metal screws rises to the dignity of invention, especially in view of the fact that the mode of joining glass to glass is merely extended to the joining of glass to wood under the Weber patent.

1. Under section 4888 of the Revised Statutes the application for a patent must particularly point out and distinctly claim the part, improvement or combination which the applicant claims as his invention or discovery, and while the claim may be illustrated it cannot be enlarged by language used in other parts of the specification.

Keystone Bridge Co. v. Phoenix Iron Co., 95 U. S. 274.

Railroad Co. v. Mellon, 104 U. S. 112.

Western Electric Co. v. Ansonia Co., 114 U. S. 453.

Yale Lock Co. v. Greenleaf, 117 U. S. 554.

White v. Dunbar, 119 U. S. 47.

Home Machine Co. v. National Needle Co., 134 U. S. 388.

McClain v. Ortmyer, 141 U. S. 149.

Deering v. Winona Harvester Works, 155 U. S. 286.

Coupe v. Royer, 155 U. S. 565.

United States Repair etc. Co. v. Assyrian Asphalt Co., 183 U. S. 591.

Cimiotti Unhairing Co. v. Fur Ref. Co., 198 U. S. 399.

But this rule is elementary. The claim set forth in the application for the Weber patent is as follows:

“What I claim is—

1. A structure comprising a plurality of glass plates, the edges of which are spaced from the adjacent plates, a felt cushion filling the space between the adjoining plates, the plates being cemented to the felt, each plate being adapted to fully vibrate in its natural plane of vibration, and prevented by the felt cushion from imparting its vibration to the adjacent plates.

2. A structure comprising a plurality of glass plates an unconfined edge of one plate nearly if not quite meeting another plate also with unconfined adjacent edge, and elastic material filling the space thus existing between the nearest adjacent surfaces of the plates, said plates being attached to the elastic material, whereby the plates, by reason of their unconfined edges and the intervening elastic material can each vibrate or move in any direction independently.”

It will thus be seen that the claim is limited to the mode of uniting glass to glass and is entirely silent as to the mode of joining or uniting glass to wood. True, it is claimed that where screws are used each

plate cannot vibrate in its natural plane of vibration without imparting its vibration to adjacent plates, but this would seem to be a mere result which is not patentable.

Knapp v. Morris, 150 U. S., 221, 227.

Wollensak v. Sargent, 151 U. S. 227.

Cash Register Co. v. Cash Indicator Co., 156 U. S. 502, 515.

Columbus Watch Co. v. Robbins, 64 Fed. 384.

National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693.

2. But if it be conceded that the mode of joining the glass to the wood is covered by the claim, yet it occurs to me that the mere substitution of cement for screws would occur to the rudest and most unskilled mechanic. Such a change does not call for the exercise of inventive genius or creative faculty and ought not to be dignified by letters patent.

Yale Lock Co. v. Greenleaf, 117 U. S. 554, 559.

As a general rule, "that which infringes, if later, anticipates, if earlier," and it seems to me that if the manufacture and sale of the Whitcomb cases followed the patent a clear case of infringement would be presented.

Miller v. Eagle Manufacturing Co., 151 U. S. 186 and cases cited.

The testimony of Whitcomb tends to show that he manufactured and sold cases identical with the Weber case long prior to the date of the application for a patent, but the witnesses appeared to be in error as to the kind of cases sold to different parties at different times and the manufacture and sale of the iden-

tical case is not established with that degree of certainty required by the patent law. On the entire record I am of opinion that the bill is without equity and should be dismissed. Let a decree be entered accordingly.

Endorsements: Opinion.

Filed in the U. S. District Court for the Eastern District of Washington, September 18, 1913.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

NO. 1365.

DIAMOND PATENT COMPANY, a Corporation,
Complainant,

vs.

S. E. CARR COMPANY, a Corporation,
Defendant.

DECREE.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED and DECREED as follows:

That Letters Patent No. 801,944 for an improvement in show cases issued to Fred Weber on October 17, 1905, are invalid by reason of anticipation through prior use; that the bill of complaint herein is without equity and this case is hereby dismissed with costs to the defendant.

Done in open Court this 26th day of September, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Due service and receipt of a copy of the within decree on September 22, 1913, is hereby admitted.

(Signed) LUBY & PEARSON,
Solicitors for Complaint.

Decree.

Filed in the U. S. District Court for the Eastern District of Washington, September 26, 1913.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

NO. 1365—IN EQUITY.

DIAMOND PATENT COMPANY, a Corporation,
Plaintiff,

vs.

S. E. CARR COMPANY, a Corporation,
Defendant.

ORDER FOR WITHDRAWAL OF EXHIBITS.

Good cause appearing therefor, IT IS HEREBY ORDERED that all exhibits filed by the plaintiff and by the defendant to the foregoing action, and contained within the file thereof, and all models in the possession of the Clerk of this Court, may be withdrawn for the purpose of being transmitted to the United States Circuit Court of Appeals for the Ninth Circuit—the same

to be returned to the Clerk of this Court on the final determination of said cause.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Order for Withdrawal of Exhibits.

Filed in the U. S. District Court for the Eastern District of Washington, January 12, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

NO. 1365—IN EQUITY.

DIAMOND PATENT COMPANY, a Corporation,
Plaintiff,

vs.

S. E. CARR COMPANY, a Corporation,
Defendant.

ASSIGNMENT OF ERRORS.

NOW COMES the Diamond Patent Company, the plaintiff in the above entitled action, and files the following assignment of errors upon which it will rely in the United States Circuit Court of Appeals for the Ninth Circuit, and which it will also rely upon in its appeal in the above entitled cause, viz:

FIRST: Error of the Court in holding that United States Letters Patent No. 801,944 for an improvement in show cases, issued to Fred Weber, on October 17th, 1905, being the patent in suit, are invalid by reason of anticipation through prior use;

SECOND: Error of the Court in holding that the Bill of Complaint in said cause is without equity, and

adjudging and decreeing that said cause be dismissed;

THIRD: Error of the Court in no holding that the said Patent was and is valid, and in not granting the relief prayed for in said Bill of Complaint.

(Signed) SCRIVNER & MONTGOMERY, and
LUBY & PEARSON,

Attorneys for Plaintiff and Appellant.

Endorsements: Due service and receipt of a true copy of the within Assignment of Errors is hereby admitted this 12th day of January, 1914.

(Signed) MORRILL, CHESTER & SKUSE and
S. H. CUTTING,

Attorneys for Defendant.

Assignment of Errors.

Filed in the U. S. District Court for the Eastern District of Washington, January 12, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

NO. 1365—IN EQUITY.

DIAMOND PATENT COMPANY, a Corporation,
Plaintiff,

vs.

S. E. CARR COMPANY, a Corporation,
Defendant.

TO THE HONORABLE, THE DISTRICT COURT
OF THE UNITED STATES FOR THE EAST-
ERN DISTRICT OF WASHINGTON, NORTH-
ERN DIVISION.

The plaintiff herein, DIAMOND PATENT COMPANY, a Corporation, feeling themselves aggrieved by the decretal order made by said Court on the 26th day of September, 1913, and the decree of dismissal made and entered on said day in pursuance of said order, whereby it adjudged and decreed that the defendant herein had not infringed upon the rights of the said plaintiff in and under certain Letters Patent of the United States, viz: "Letters Patent No. 801,944, dated October 17th, 1905, issued to Fred Weber of California," and owned by said plaintiff (being the Letters Patent sued on herein), and that said Letters Patent were anticipated and void for want of invention; and decreed that plaintiff's bill filed in said cause be dismissed with costs to the defendant, now come by their counsel, Messrs. Luby & Pearson and Scrivner & Montgomery, and petition the said court for an order allowing said plaintiff to prosecute an appeal from said decree to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of Congress, and the Statutes of the United States, in such cases made and provided, and also that an order be made fixing the amount of security which plaintiff shall give and furnish upon such appeal, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said appeal by said United States Circuit Court of Appeals, for the Ninth Circuit.

And your petitioner will ever pray, etc.

(Signed) SCRIVNER & MONTGOMERY, and
LUBY & PEARSON,

Attorneys for Plaintiff.

Endorsements: Due service and receipt of a copy of the within petition is hereby admitted this 12th day of January, 1914.

(Signed) MORRILL, CHESTER & SKUSE,
and S. H. CUTTING,

Attorneys for Defendant.

Petition for Appeal.

Filed in the U. S. District Court for the Eastern District of Washington, January 12, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

NO. 1365—IN EQUITY.

DIAMOND PATENT COMPANY, a Corporation,
Plaintiff,

vs.

S. E. CARR COMPANY, a Corporation,
Defendant.

ORDER ALLOWING APPEAL.

Upon motion of Messrs. Luby & Pearson and Messrs. Scrivner & Montgomery, counsel for plaintiff, and on filing the petition of the Diamond Patent Company, plaintiff, together with an assignment of errors, IT IS ORDERED: That an appeal be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of this court, entered on the 26th day of September, 1913, dismissing said action and holding that the patent sued upon was void, on the ground of anticipation;

AND IT IS FURTHER ORDERED; That the amount of the bond upon said appeal be, and the same is hereby, fixed at the sum of Five Hundred and no-100 Dollars;

AND IT IS FURTHER ORDERED: That, upon the giving of such bond, the said judgment and decree be suspended and stayed until the determination of the appeal by the said Circuit Court of Appeals for the Ninth Circuit, and that a certified transcript of the record and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

(Signed) FRANK H. RUDKIN,
Judge.

Endorsements: Order Allowing Appeal and Fixing Amount of Bond on Appeal.

Filed in the U. S. District Court for the Eastern District of Washington, January 12, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

NO. 1365—IN EQUITY.

DIAMOND PATENT COMPANY, a Corporation,
Plaintiff,

vs.

S. E. CARR COMPANY, a Corporation,
Defendant.

BOND FOR APPEAL.

KNOW ALL MEN BY THESE PRESENTS:
That we, the DIAMOND PATENT COMPANY, a

corporation, as principal, and the Fidelity & Deposit Company of Maryland, as surety, ARE HELD AND FIRMLY BOUND unto S. E. CARR COMPANY, a Corporation, the defendant, in the full and just sum of Five Hundred and no-100 Dollars, to be paid to the said defendant, its successors or assigns, for the payment of which, well and truly to be made, we bind ourselves and our successors, jointly and severally, firmly by these presents. Sealed with our seals and dated this 14th day of January, A. D., 1914.

WHEREAS, in above entitled suit pending in the District Court of the United States for the Eastern District of Washington, Northern Division, wherein said Diamond Patent Company, a Corporation, was plaintiff, and the said S. E. Carr Company, a Corporation, was defendant, a decree was rendered on the 26th day of September, 1913, against the said Diamond Patent Company and in favor of the said S. E. Carr Company, and said Diamond Patent Company has been granted an appeal in said cause and filed a copy thereof in the Clerk's office of said court to obtain a reversal of the decree in said suit, and a citation has been issued to said S. E. Carr Company citing it to appear at a session of the United States Court of Appeals for the Ninth Circuit to be holden at the City and County of San Francisco, in the State of California, on the 11th day of February, 1914:

Now the condition of this obligation is such, that if the said Diamond Patent Company shall prosecute said appeal to effect, and if it fails to make its plead good, shall answer all damages and costs, then the above

obligation to be void, otherwise to remain in full force and virtue.

(Signed) DIAMOND PATENT COMPANY.
By Scrivner & Montgomery and Luby & Pearson, Its
Attorneys.

SEALED and Delivered in presence of
(Seal) (Signed) S. M. SMITH.
(Signed) ALBERT GOEDEN.
FIDELITY & DEPOSIT CO. OF MARYLAND.

By W. L. Berry, Attorney in Fact.
Attest: W. T. McCrea, General Agent.

(Seal)

Approved by
(Signed) FRANK H. RUDKIN,
District Judge.

Endorsements: Bond on Appeal.

Filed in the U. S. District Court for the Eastern
District of Washington, January 14, 1914.

W. H. HARE, Clerk.
By Frank C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

NO. 1365—IN EQUITY.

DIAMOND PATENT COMPANY, a Corporation,
Plaintiff,

vs.

S. E. CARR COMPANY, a Corporation,
Defendant.

CITATION. (Lodged Copy).

UNITED STATES OF AMERICA.—ss.

THE PRESIDENT OF THE UNITED STATES
TO S. E. CARR COMPANY, GREETING:

YOU ARE HEREBY CITED AND ADMON-
ISHED to be and appear at a United States Circuit
Court of Appeals, for the Ninth Circuit, to be holden
at the City and County of San Francisco, in the State
of California, on the 11th day of February, 1914, pur-
suant to an order allowing an appeal entered in the
Clerk's office of the District Court of the United
States, for the Eastern District of Washington, North-
ern Division, in that certain action, numbered 1365,
in which the Diamond Patent Company, a Corporation,
is complainant and appellant, and you are respondent
and appellee, to show cause, if any there be, why the
decree rendered against the said complainant and ap-
pellant, as in the said order allowing an appeal men-
tioned, should not be corrected, and why speedy
justice should not be done to the parties in that be-
half.

WITNESS the Honorable FRANK H. RUDKIN,
Judge of the District Court of the United States for
the Eastern District of Washington, Northern Division,
this 12th day of January, 1914.

(Signed) FRANK H. RUDKIN, Judge.

Attest:

(Signed) W. H. HARE, Clerk.

(Seal)

By Frank C. Nash, Deputy.

Endorsements: Due service and receipt of the within Citation is hereby admitted this 12th day of January, 1914.

(Signed) S. H. CUTTING,
Attorney for Defendant.

Citation (Lodged Copy).

Filed in the U. S. District Court for the Eastern District of Washington, January 12, 1914.

W. H. HARE, Clerk.
By Frank C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

NO. 1365—IN EQUITY.

DIAMOND PATENT COMPANY, a Corporation,
Plaintiff,

vs.

S. E. CARR COMPANY, a Corporation,
Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.
TO W. H. HARE, CLERK OF SAID COURT:

YOU WILL PLEASE prepare and insert in the transcript on appeal, in the above entitled cause, the following papers, to-wit:

- (a) Bill of complaint;
- (b) Answer; *✓ ✓*
- (c) Amended or supplemental answer;
- (d) Condensed statement of evidence as finally allowed and approved by the Court;
- (e) Decree dismissing the suit and entering judgment for defendant;

- (f) Petition for appeal;
- (g) Assignment of errors;
- (h) Order allowing appeal;
- (i) Undertaking on appeal;
- (j) Order for withdrawal of exhibits;
- (k) Citation on appeal,

and such subsequent orders as the Court may make and file herein.

(Signed) SCRIVNER & MONTGOMERY, and
LUBY & PEARSON,

Attorneys for Plaintiff.

Endorsements: Duse service and receipt of a true copy of the within Praeipice is hereby admitted this 12th day of January, 1914.

(Signed) MORRILL, CHESTER & SKUSE,
and S. H. CUTTING,

Attorneys for Defendant.

Praeceptum for Transcript of Record.

Filed in the U. S. District Court for the Eastern
District of Washington, January 12, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

NO. 1365—IN EQUITY.

DIAMOND PATENT COMPANY, a Corporation,
Plaintiff,

U.S.

S. E. CARR COMPANY, a Corporation,
Defendant.

PRAECIPE.

TO W. H. HARE, CLERK OF SAID COURT:

YOU WILL PLEASE prepare and insert in the transcript on appeal, in the above entitled cause, the following papers, to-wit:

1. Motion to amend the answer.
2. Order granting leave to amend answer.
3. Stipulation amending the amended answer by interlineation.
4. Opinion of Judge Rudkin deciding the case.

MORRILL, CHESTER & SKUSE, and
S. H. CUTTING,

Attorneys for Defendant and Appellee.

Endorsements: Due service of a true copy of the within Praecipe on January 16, 1914, is hereby admitted.

(Signed) LUBY & PEARSON,

Attorneys for Complainant.

Praecipe of Defendant for Transcript of Record.

Filed in the U. S. District Court for the Eastern District of Washington, January 16, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

76 *Diamond Patent Company, Appellant, vs.*
In the District Court of the United States, Eastern
District of Washington, Northern Division.

No. 1365.

DIAMOND PATENT COMPANY, a Corporation,
Complainant,

vs.

THE S. E. CARR COMPANY, a Corporation,
Defendant,

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD.

United States of America, Eastern District of
Washington—ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing pages, from 1 to 75 inclusive, to be a full, true, correct and complete copy of the record, pleadings, testimony and all proceedings had in said action as called for by the plaintiff and appellant and the defendant and appellee in their praecipes for a transcript of the record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the order, judgment and decree of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of \$93.20, and that the same has been paid to me by

Scrivner & Montgomery and Luby & Pearson, solicitors for complainant and appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the City of Spokane, in said Eastern District of Washington, Northern Division, in the Ninth Judicial Circuit, this 29th day of January, A. D. 1914, and the Independence of the United States of America the One Hundred and Thirty-eighth.

[SEAL]

(Signed) W. H. HARE,
Clerk U. S. District Court for the
Eastern District of Washington.

United States
Circuit Court of Appeals
For the Ninth Circuit

MAY TERM, 1914.

DIAMOND PATENT COMPANY (a
Corporation),

Plaintiff and Appellant,

v.

S. E. CARR COMPANY (a Corpora-
tion),

Defendant and Appellee.

APPELLANT'S OPENING BRIEF

This is an action for an injunction restraining defendant from infringing United States Letters Patent No. 801,944, dated October 17th, 1905, issued to one Fred Weber, of Los Angeles, California, and for an accounting. The appellant is the assignee of the patent in suit, and as such assignee has been the owner of the patent ever since the 5th day of

February, 1910 (the date of the assignment). For convenience, we will hereafter call the appellant the plaintiff and the appellee the defendant.

The defendant assails the patent on the sole ground of anticipation by prior knowledge and use by one W. G. Whitcomb, in Kansas City, Missouri. Proper notice having been given, the defendant took testimony in Kansas City to establish the fact of prior use by said Whitcomb. Consequently, the only question now before this Court for its judgment and decision is simply one of anticipation by prior use by said Whitcomb. Prior use is made a defense under Subdivision V of Section 4920 of the Revised Statutes of the United States. This defense is an extremely technical one and requires positive and exact evidence which will satisfy the mind of the Court, beyond a reasonable doubt and to a moral certainty of the actual potential existence of the specific thing claimed to have been in such public use prior to the date of the patented invention; not only that, but it must appear that there existed an intelligent comprehension of its merits, uses and purposes, and that the making and use of it was not merely accidental or experimental. The law requires that such a defense shall be established beyond reasonable doubt in order to overcome the *prima facie* case made by the patent itself, for a patent issued by the government is presumed to be valid.

I.

**STATE OF THE ART AT THE DATE OF
THE APPLICATION FOR THE
WEBER PATENT.**

Show-cases, for the purpose of exhibiting small commercial articles for sale, have been in existence for many years. The earliest construction was simply a wooden frame with glass plates fixed in grooves in the wooden frame, which made a heavy, cumbersome and unsightly piece of furniture for show purposes. The first step in advance from these old heavy wooden frames, with the glass plates inserted, as above stated, was an all-glass case so arranged that the plates could be held together by what was termed in the trade as "metal clips," the clips being attached at the several corners of the glass plates to hold them together. As a step forward in these metal clip cases (they not having proved satisfactory) the manufacturers also inserted glue or paste along the edges of the glass plates, which becoming hard assisted in holding them together. These not having proved satisfactory to the trade, the manufacturer undertook to make an all-glass case, whereby the edges of the glass plates were glued, or pasted together and bolts or screws inserted through the glass plates at the edges or corners for the same purpose as the clips. These having many objectionable features, the next step consisted of an effort to make an all-glass case by simply pasting or gluing the edges of the glass

plates together without any clips, bolts or screws, or other metallic means of holding the plates together—it being supposed that the paste or glue would dry and become hard and rigid and hold the plates together. Still the trade was not satisfied and there was a want yet to be supplied in this art. All of these methods above described, it was conceded, were in public use prior to the date of the plaintiff's patent; they had been used for years and were not satisfactory, and some other means was being sought by which the glass plates could be held together in a satisfactory manner without these metallic clips, or other metallic methods of holding them together, and at the same time make an elastic or vibrating joint. Experience in these matters suggested to Weber that an elastic or vibrating joint between these glass plates was essential in order to prevent breakage in moving, or from expansion and contraction caused by heat and cold. Where the plates were merely cemented together, either with cement or paste or other analogous substance, it had been shown that such a system of work was highly objectionable and practically useless. One serious, and perhaps the controlling objection, was that as soon as the paste or glue dried the joints became hard and rigid, and there was and could be no vibration or give in the joints and the glass plates would easily break. Those cases where the glass plates were fastened together by means of metallic clips, screws or bolts (whether with or without glue or paste) were likewise found

to be objectionable. In all of these glass cases with or without the bolts the joints became rigid and the plates were held together in a rigid, non-elastic position.

At this stage of the art, in the manufacture of all glass show-cases, Weber (the patentee) conceived the idea of making a show-case in the manner described in the patent in suit. In the specifications of his patent he says that

“The improvement resides particularly in the means of fastening one glass surface to another glass surface or to woodwork forming part of the case.

“The object of the invention (says the patentee) is to do away with drilling holes through the glass and to dispense with metallic or other fastening devices which are commonly used at the corners for holding the plates forming the case together, and to provide a fastening which will unite the parts so securely that they cannot be separated, except by such stresses or blows as would break the glass before accomplishing the dismemberment, although by the use of a proper tool the parts may easily be separated.

“Another object (says the patentee) is to provide for a certain amount of elasticity at the joint, whereby a cushion effect is produced. If the parts were rigidly united, severe shocks received by the show-case would tend to shatter the plates or displace the parts; but in the present invention the cushion joint aids in maintaining the union of the parts, affording, as it does, an elastic or resilient joint, which eases the strain at the actual union or contact faces of the plates, thereby also greatly softening the effects of shock received by the case.”

It will be seen by this quotation from the specification of the patent, that the patentee had in view something different from anything in the prior art, and something that would accomplish results also different and superior to anything theretofore known.

The several objects to be accomplished were the following:

(a) To do away with drilling holes through the glass and to dispense with metallic or other fastening devices;

(b) To unite the parts so securely that they could not be separated, except by the use of a proper tool for that purpose;

(c) To provide a certain amount of elasticity at the joint, whereby a cushion effect is produced;

(d) The formation of an elastic or resilient joint;

(e) To provide a structure comprising glass plates arranged in three different planes, each plate meeting and joining the other two, with an intervening cushion between the joining faces, to which cushion the glass plates are cemented.

That he accomplished these results is not disputed. He covered his invention by two claims, which read as follows:

(1) "A structure comprising a plurality of glass plates, the edges of which are spaced from the adjacent plates, a felt cushion filling the space between the adjoining plates, the plates being cemented to the felt, each plate being adapted to freely vibrate in its natural plane of vibration, and prevented by the felt cushion from imparting its vibration to the adjacent plates;

(2) "A structure comprising a plurality of glass plates, an unconfined edge of one plate nearly but not quite meeting another plate also with unconfined adjacent edge, an elastic material filling the space thus existing between the nearest adjacent surfaces of the plates, said plates being attached to the elastic material, whereby the plates by reason of their unconfined edges and the intervening elastic material can each vibrate or move in any direction independently."

We may here remark that the burden of the anticipatory defense is concentrated upon the use of alleged cemented felt joints. To the extent, however, of whatever differences there may be, as a matter of law or fact, between the two claims, there is no evidence directly applicable to the second claim, and that difference remains unassailed, and we contend that there is not sufficient evidence to justify a judgment that either of said claims are void by reason of the prior use claimed.

II.

PLAINTIFF'S STRUCTURE.

This patent must, of course, be construed as meaning and covering a concrete thing, to-wit: A show-case. The whole thing, and nothing more nor less than the complete show-case described. It is true that this show-case is made up of several elements which co-acting together make the show-case called for, and in order to anticipate it, the defendant must show a concrete case possessing the same elements arranged in substantially the same way and accomplishing the same purposes.

When understood, the process of construction of the plaintiff's patented show-case is not difficult, but if its fundamental principles of construction, mode of operation and the results are not fully comprehended and appreciated by the constructors, it cannot be made, at least without a pure accident, so as to operate successfully. The correctness of this statement is made manifest in the testimony of Whitcomb (a witness for the defendant). The completed structure is shown in figure (1) of the patent. The front plate, side plates and top plate resting upon front and side plates, are simple enough. The base of this structure is wood with the top edges rabbeted for the side plates to rest in; the back is also a wooden structure.

When everything is in readiness, a strip of laminated felt has ordinary cement quite thick and

plastic applied to it superficially, forming a skin, as it were, on both sides of the felt, thus retaining its natural state, thereby forming a laminated structure, comprising the two layers of cement with an intervening layer of felt forming the yielding or resilient substance. This laminated structure is then applied to the edges of the side plates and the top plate, the plates brought together in a proper juxtaposition, and at the back of the case where the glass plates fasten to the wooden structure (as shown in figure 1-9) they are brought together in the same manner.

A number of advantages over all other methods of uniting glass plates in show-cases have been realized by this structure. Among them may be mentioned the fact, that when the plates have been united in the manner described they cannot be separated without breaking the glass, except by running a sharp knife through the felt between the two layers of cement. This feature is one of considerable value, inasmuch as it permits of easy removal of a plate when desired, or when making repairs when a plate has been broken. The more important advantage, however, is the yielding nature of the felt cushion, which absorbs the sharpness of shocks on the case and obviates breakage, which so frequently happens with all other forms of fastenings, such as metallic corner fastenings or structures in which a glass plate is grooved to receive the edges of another glass plate, which parts are united by

glue at the groove, or show-cases in which the vertical glass plates are tightly fitted in grooved frames of wood or other material. In such structures a severe shock imparted directly to the front or side plates will fracture them, as a side plate has no inter-resiliency with the front plate or top plate, but this trouble is avoided by the patented device, as there is inter-resiliency between both top and vertical plates which allows each plate to move independently of the other, whether one plate alone is jarred, or whether all plates are jarred simultaneously, so that each plate vibrates in its own plane of vibration. Of course if a liquid material like that unquestionably used by Whitcomb which immediately permeates the felt and then dries and hardens, the joints necessarily became rigid and non-elastic and, therefore, obtained none of the advantages of the plaintiff's invention.

We contend that the testimony in this case (on both sides) shows conclusively that the plaintiff was the first in the art to provide a structure comprising glass plates arranged in three different planes, each plate meeting and joining the other two, with an intervening cushion between the joining faces, to which cushion the glass plates are cemented, in a method to form a structure where each plate is adapted to freely vibrate in its natural plane of vibration, and prevented by the felt, or other elastic material, from imparting its vibration to the adjacent plates.

We think from the foregoing description, to-

gether with the examination of the patent itself, the Court will have no difficulty in comprehending the plaintiff's patented structure.

The anticipatory matter upon which the defendant relies consists of some ten (10) cases, manufactured by Whitcomb in about 1899 or 1900, at Kansas City, and shipped to Joplin, Missouri, to the Cooper Drug Company, who had purchased them of Whitcomb. These cases were set up in the drug store of the said Cooper Drug Company and are there still. Another lot of four (4) or five (5) cases were manufactured by Whitcomb, in Kansas City, and sold to one Federmann at about the same time, which are still in use in that city. All of these cases have been examined and testified to by witnesses for the plaintiff and defendant.

It appears from portions of the record that Whitcomb had been experimenting in various kinds of "all glass show-cases" in an effort to find something that would accomplish the same purposes as those described in the patent in suit, but those experimental cases however made have no bearing upon the case now before the Court. The sole question is, whether the Federmann or Cooper Drug Company cases are really the full anticipation of the plaintiff's invention. It is, therefore, necessary to get a clear understanding of how these two batches of cases were constructed. The difference between them, however, is not very marked and it is not very material, for we concede that if one batch would

anticipate the patent the other would. In describing them, however, we will call the attention of the Court to the only difference that we have observed.

III.

FEDERMANN CASES.

These cases are "all glass show-cases"; felt was used in the vertical and side joints of the top plate, but not on the back rail. They were put together with a liquid substance made by Whitcomb—the component parts of which are unknown, but Whitcomb said that it was *not cement*, although he called it cement, but that he might just as well have called it anything else; it was a semi-liquid substance that could be poured from one vessel to another; the top plate was held to the back frame by means of bolts which were inserted through holes bored through the glass and running through the glass into the back frame.

On page 32 of the record (near the bottom) it was stipulated that the four (4) or five (5) Federmann cases were made substantially like the Cooper cases, commonly known in the record as the "Joplin cases," and the only difference between the two (disclosed by the testimony) is simply, that in the Joplin cases there was simply a piece of felt laid along the back rail, without any glue or cement, but the top plate was bolted down tight to the back frame in each instance. The evidence is overwhelming that this structure made a tight rigid joint,

which did not, and could not, permit any elasticity or resiliency in the plates, and which did not possess or accomplish any of the results sought to be accomplished by the patentee.

Now the differences between the Whitcomb structure and the plaintiff's structure are these:

(a) Whitcomb did not use in his structure cement, but he used a semi-liquid compound of his own—the ingredients of which are unknown and which, undoubtedly, dried out in a short time and necessarily left a rigid joint; it permeated the felt so that the felt and this liquid substance when hardened possessed none of the qualities of the felt and cement used by the plaintiff;

(b) The top plate was bolted or screwed down to the top railing of the wooden frame so that there could not possibly be any elasticity in that joint, and the top plate itself would necessarily be held by these screws in an absolutely rigid position. This rigidity would necessarily transmit its effect throughout the entire body of the case. At any rate (as we will hereafter show from the testimony) these cases did not possess the constructive features of the plaintiff's device, and did not accomplish the purposes desired to be accomplished and which were accomplished by the plaintiff's device.

While it must be conceded that Whitcomb used felt strips, he did not treat these felt strips with cement as the plaintiff did, or at all, and his method

of treatment did not involve or obtain the results of an elastic resilient joint, nor provide a structure comprising a plurality of glass plates (the edges of which are spaced from the adjacent plates, a felt cushion filling the space between the adjoining plates, the plates being cemented to the felt and each plate being adapted to freely vibrate in its natural plane of vibration, and prevented by the felt cushion from imparting its vibration to the adjacent plates). On the contrary, the Whitcomb structure was not so arranged that the plates were adapted to freely vibrate, or to vibrate at all, in their natural, or any, plane of vibration, nor were the plates prevented by the felt cushion, or anything else, from imparting vibration to the adjacent plates; the joints being rigid in the Whitcomb cases no such result could be produced.

IV.

ARGUMENT.

As already partially indicated, our contention is: That the evidence shows that these Joplin and Federmann cases were not the equivalent or anticipatory of the patented invention for the following reasons:

(a) They did not have cement in the joints, but a semi-liquid substance of unknown ingredients which was not cement;

(b) The ingredient used in these cases permeated the felt and soon dried out, and as soon as the

water, or other liquid substance evaporated the joints became hard and rigid, so that there could not be any elasticity or resiliency. The top plates were bolted down to the wooden frame by boring holes through the glass and inserting the bolt or screw through the glass plate into the wood, so as to make the joint along the back rail absolutely rigid, which necessarily influenced the rigidity of the entire case, so that the case thus made was not the case described in the patent;

(c) The plates were not so "cemented" to the felt so that each plate was adapted to freely vibrate in its natural plane of vibration, and prevented by the felt cushion from imparting its vibration to the adjacent plates.

As these are the crucial points in the case, we desire to refer to the testimony to establish the correctness of our statement of the facts.

We shall contend that, from the evidence and under the law, the case hinges upon the proposition as to whether the Joplin and Federmann structures made an elastic and resilient joint between the plates, so that the said plates might freely vibrate in their own natural plane, and being prevented by the laminated felt cushion from imparting vibration from one plate to the other, for if the Joplin and Federmann structures produced that result it would show substantial similarity in the method of construction. But on the contrary if that result was not produced or obtained by their method of

construction it would demonstrate beyond question the diversity in the means used. In other words, if these structures would not produce these results, it is conclusive evidence (as we will show when we come to discuss the law of the case) that there was a difference in the structure, which we shall claim was a patentable difference.

William G. Whitcomb, of Kansas City, Mo., was the principal witness on the part of the defense to sustain the contention of the defendant, and to establish the similarity and equivalency of the two devices. Commencing at the bottom of page 30 of the transcript he testifies concerning these cases, and on page 31 he says:

“The glass plates in these Joplin and Federmann cases were fastened together with a preparation that I made myself; it was not ordinary cement. I would go into a drug store and get the druggist to give me some drug and fix up some stuff and *call it cement*; I might have called it something else; I might have called it ‘dog,’ but didn’t. . . . I have not got any of it; it has to be used right away. . . . I didn’t like to make them; didn’t want to make them; talked a fellow out of them. If a fellow came in and wanted one case I would talk him out of it. My custom has been to advise people not to take them. I am willing for both sides to assume that the Federmann and Joplin cases would be a fair representation of my idea of how I manufactured cases along in 1898 and 1905. I do not think that these ‘all glass show-cases’ are a good practical proposition—those that I have seen; I do not consider any of them a success. The drug company

cases at Joplin had felt joints. The other material used by me in making them was 'cement'; I made it myself; it was a special material—something that I worked out myself; naturally didn't publish it; it was a special preparation which I called 'cement'; it was a soft material—something like paint; we could pour it from one vessel to another; I suppose it would have a tendency to harden; naturally most anything would evaporate or harden; it permeated the felt at first, and then I got felt that we had treated water proof; I can't think what we called it."

It will be noted here that these Joplin and Federmann cases were not made with his so-called "*water proof felt*." He got this idea of water proof felt years later, and probably after the issuance of the patent. The testimony does not clearly show when he did get his "water proof felt," but it is clear that the Joplin and Federmann cases were not made with it; these were the first cases that he made of this class, according to his own story.

Commencing on page 42 of the transcript appears, under the head of "Defendant's proposed amendments to the condensed statement of the testimony taken in the above entitled action," a little more detailed statement by Whitcomb, as to how he made those Federmann and Joplin cases, and some others, which were made the same way, but there is nothing in it to create any substantial conflict with what I have quoted from the plaintiff's statement of the case.

On page 44 (near the middle of the page) he says:

“These Joplin cases were constructed with felt in the joints between the glass, with an adhesive substance on either side of the felt adhering it to the glass; that the cement used in those cases was a preparation he got up himself; that he used felt in the joints of these ‘all glass cemented cases’ for the *vibration of the case* (what distinction the witness intended to draw here between the ‘vibration of the case’ and the ‘vibration of the plates’ in different planes, we do not know); that he made some with felt simply stuck one plate of glass on the other plate and found it was so solid that any little jar would break it; then he thought of felt to give the elastic movement and make an elastic joint; that the joints in the Federmann cases, and all those are not hard and fixed, they appear to be solid, but there must be some give to them or they will break.”

Of course, the witness was here arguing the proposition, and was compelled to admit that they appeared to be solid. But, in his opinion there must have been some give, or they would break. The fact is, that some of the plates had broken in eight out of ten of the Joplin cases for various reasons, and also some of the Federmann plates. But, giving the most liberal construction to this testimony, and even admitting that it is to some extent in conflict with the first portion of his testimony as it appears in the statement, still it is not sufficient to show (especially in view of the other testimony on the subject) that these Joplin and Federmann cases were so constructed with such cement, or other material, as to give that vibration necessary to accomplish the purposes sought and accomplished by the patented invention; it does not establish any resili-

ency or vibration, or that their method of construction prevented any plate from imparting its vibration to the adjacent plates. It will be observed here that this could not occur to the top plate, which is the most important of all. There could be no vibration along the side joints of the top plate on account of the rigidity caused by the bolts or screws being inserted along the back edge. If the plate was rigid along the back edge, or any other edge, it would destroy any vibration in that plate at least, and this effect would necessarily be imparted to all the plates upon which it rested.

William N. Federmann testified on behalf of the defendant, and on pages 32 and 33 gave the following testimony upon the material points involved in the case:

“It was admitted that the four or five Federmann cases were made substantially like the Cooper drug store cases (commonly known in the record as the ‘Joplin cases’); the witness then proceeds to say:

“I think, so far as my impression and observation goes, the joints were solid tight joints; that the glue or cement, or whatever material was put in between the glass plates, made a solid joint—as I understand it—and that, according to my knowledge, information and observation, during all these years, there was no elasticity in the joints at all; none that I know of. All the cases furnished me by Mr. Whitcomb came with the bolts in the corners as shown by the exhibit of the Joplin Drug Company cases on file in this cause, with the exception that some of them had bolts in the middle of the case along the back rail.”

His testimony is direct and positive.

In the defendant's Proposed Amendments to the Plaintiff's Statement, and commencing on page "45" of the transcript, appears a little more of the testimony of Federmann, which was inserted for the purpose of attempting to qualify his positive statements already quoted, but the qualification is of so slight a nature that we do not consider it worth while to dwell upon it. He does not attempt to qualify the statement, that according to his knowledge, information and observation during all these years there was no elasticity in the joints at all, and if this be true it is all that we have to establish.

Gustav A. Holm Jr., on page 33, Tr., testified on behalf of the plaintiff as follows:

"I have repaired a number of the Whitecomb all-glass show-cases; they were put together with some kind of a composition; I couldn't tell you what it is, but it seemed to be a very hard substance after it dried. It made a hard, solid joint. I do not know what kind of a paste or cement, or glue or what it was; couldn't tell anything about it. I saw some rubber in some of the joints and some other substance there that must have been soft when it was put on; some kind of a paste."

This testimony does not indicate a show-case anything like the plaintiff's patented case. It does not refer to the Joplin or Federman cases, and is only purtenant to show that along about that time he was

making these rigid jointed cases, and that they were looked upon by the public, and by all those who had anything to do with them, as rigid jointed cases.

H. W. Jackson was then sworn on behalf of the plaintiff, and testified as follows:

“I am a licensee of the plaintiff; I know the Whitcomb Company; I had a conversation with Mr. Whitcomb some four or five months ago about all-glass cemented show-cases; he said they were no good; he denounced the cases as being no good, on account of breakage that might occur in them, and the inaccessibility of the joints to be repaired; it was a hard matter to fix them when they got broken; he had found that his trade preferred to have the cases with clamps or with holes bored through the plates on account of the ease with which this kind of case could be repaired; also, that they could be shipped knocked down, which would be an impossibility in shipping a cement case, on account of its having to be shipped set up”.

If these statements are true, they show that Whitcomb, at the time at least that he made these Joplin and Federmann cases, had no comprehension whatever of an all-glass case with elastic resilient joints, and that he never tried to make one; didn't know that it could be made, and did not appreciate the value of them when they were made.

The witness further testified:

“I have been manufacturing the plaintiff's patented show-case quite extensively; they have generally been very satisfactory to customers. All-glass cases can be shipped set up without

any difficulty. I know of some of the all-glass cases made by the Whitcomb Company back in 1902 and 1903, and along there, and know how they are made: there were joints made to look like glue had been used, or some other substance; seemed to be very hard and chipped the under side of the top plate of glass and made them unsightly. We repaired two of them; the joints in the cases repaired by us were solid and rigid”.

This testimony is corroborative of the statement of the other witnesses, that Whitcomb was making a case with rigid joints, and his own testimony already quoted from page 31 shows conclusively, that he did not approve of them; that he didn't like to make them; talked a fellow out of them, and would advise people not to take them, and particularly when he made the Joplin cases he made up his mind that he didn't like the cases at all.

Taking this testimony, in connection with other testimony in the case which conclusively shows the utility, superiority and value and popularity of the patented elastic jointed case, we earnestly contend that it conclusively appears that there was a diversity of results, which could not result from similarity of means, because (as we shall show hereafter, and as hereinbefore stated) it is a fundamental principle of patent law, that diversity in results is absolute proof of diversity in means.

Mr. Fred Weber (the patentee) p. 35 Tr. testified on behalf of the plaintiff, but, as he knew nothing about the alleged anticipatory device, his testi-

mony is not important upon this subject, except in so far as it tends to show that he knew the difference between a rigid jointed case and an elastic jointed case, and that the latter was what he was trying to obtain; and on page 36 (at the conclusion of his testimony) he said:

“I had seen show cases where the top plates were bolted onto the woodwork, making a solid joint; that was what I was endeavoring to get away from; I wanted an elastic joint and I got it.”

James P. Shaffer was then sworn for the plaintiff, and on page 37, testified (among other things) that he called on Mr. Whitcomb, and put the proposition up to his Company for the purpose of obtaining contracts with the Whitcomb Company to manufacture the patented cases on a royalty basis and, after showing Mr. Whitcomb the model which was only a piece of one corner of the case, Whitcomb said that he didn't think that Mr. Shaffer would find it a good proposition, on account of the elasticity that was in the joints, and that, he had tried cemented show cases but had found them unsatisfactory, and went to his desk and brought forth a metal clamp which is very commonly known in the show-case business.

Mr. William E. Price, p. 37 Tr., the owner of the Cooper Drug Company of Kansas City, which bought these cases, known as the “Joplin cases”, of Mr. Whitcomb, said (among other things) that in 1899 or 1900 he got ten (10); they were shipped

knocked down. Mr. Whitcomb came down from Kansas City and set them up. I helped him set up eight of the cases; the other two I put up myself after he left; Price then described how they were made in a general sort of a way, but calls the material used "glue," which in fact was the semi-liquid material prepared by Mr. Whitcomb in Kansas City, and taken down to Joplin to make up the cases. The glass on the back edge was bolted down to the wood without glue. The Insurance Company refused to insure them while they had bolts along the back rail. He says at page 38, transcript:

"The material used in the bolts (joints) looked to me just like ordinary liquid glue; it was some material that Mr. Whitcomb brought with him."

Mr. A. C. La Rue Shaffer then testified for the plaintiff, which commences on page 38; he says: that the patented cases had given satisfaction to the purchasers who used them; that they had never had any complaint since they commenced business. He says: that he examined the Federmann cases in Kansas City; one of them (I think) was a wood frame and two of them the glass was held together with clamps, and two of them were held together with a substance such as glue or similar substance; that is: the end plates were set and the front plate was held to the end plate with this substance, and the top plate was put on the top of the ends and front plate, and back rail, and the back was held by a bolt running through the top plate into the

back frame. There was no cement or glue or felt on the back rail. The top plate was held to the back frame by means of bolts, by boring a hole into the glass and running the bolt through the glass into the back frame. These cases were not constructed according to the description of the Weber patent.

He says: he knew the Cooper Drug Company in Joplin, and he went to examine their cases. Mr. Whitcomb stated, that he had made some cases back there in 1899 or 1900, and that he went down to investigate and see how they were made. Two of the cases, which appeared to be in their original shape, were held together with glue and felt, with bolts through the top plate into the back frame to hold the top plate to the back frame. He says: he thought it vital to use something in the joints that would not permeate the felt. If you permeate the felt it draws up and makes a hard joint, and that is what we avoid in the patent. Our patent covers an elastic joint; that is: when we made a case we made it with an elastic joint. The Federmann cases are what I call solid joints all through, because the material used (I would call it "glue") would permeate the felt and make a hard joint. Whatever material he used permeated the felt and bolts were used as before described. The Joplin cases (he said) are the same composition as the Federmann cases, and his testimony with reference to the Federmann cases applied to the Joplin cases.

A. E. Edwards, a witness for the defendant

(whose testimony commences on page 40 of the transcript) testified: That his Company manufactured the show cases used by the defendant in the suit; that he had had about four years experience in the manufacture of this kind of show-case (this four years immediately preceded the commencement of this suit); he said: that he was familiar with the ingredients that are used in cementing the cases together; it is a combination of drugs, oils, etc., making a cement so that it will work easily, and is used in connection with felt; he said:

“I think when the proper kind of cement and felt are used (under the proper conditions) that it makes an ideal joint.”

Outside of some testimony proposed by the defense as additions to our statement (some of which we have referred to), this constitutes the testimony in the case. The testimony brought forth by the proposed amendments of the defendant to the statement does not add to or detract from anything stated in the original condensed statement prepared by the plaintiff under the Rules of the Court.

It may be further remarked, with reference to this testimony, that it very clearly shows, that the plaintiff's patented case had gone quite extensively into public use, and wherever it had become known and understood it has superseded all other cases, and that the business of selling and the use of these cases is constantly increasing.

It will be seen from the foregoing, that the case is not a complicated one. The whole contention may be dogmatically stated as follows:

(a) The plaintiff's patented case is made up by the use of felt and cement in the joints between the respective plates, so united and constructed that each plate is adapted to freely vibrate in its natural plane of vibration, and each plate is prevented from imparting its vibration to the adjacent plates;

(b) The anticipating devices relied upon are not made up with cement and felt in the joints, so united and constructed that each plate is adapted to vibrate in its natural plane of vibration—each plate being prevented from imparting its vibration to the adjacent plates.

In other words: the said anticipating devices do not have elastic joints, so constructed and united as to prevent the vibration of the plates from imparting such vibration to the adjacent plates. In other words: the joints being rigid any vibration in a given plate must of necessity be imparted to the adjacent plates.

V.

THE LAW OF THE CASE.

It seems to us, that the first question that would necessarily address itself to the mind of the Court is this:

Is a glass case so constructed as to have rigid joints, and where the glass plates do not, nor cannot freely vibrate, or vibrate at all, in its natural plane and must necessarily impart the respective vibrations when they occur in any plate to its adjacent plates an anticipation of a structure which is so constructed that each plate is adapted to vibrate in its natural plane of vibration, and is prevented by a felt cushion from imparting its vibration to the adjacent plates?

This statement also involves a consideration of the effect of having the top plate bolted down with metallic screws or bolts to the back rail, and thus making the joint between the wooden frame and the top plate along the back absolutely rigid. It is not contended that the claims of the patent in terms cover the use of felt and cement along the back rail between the wooden surface and the back edge of the top plate; or, in other words: the joining of glass to wood by the means described. Although the fastening of one glass surface to *woodwork* forming the parts of the case, is mentioned in the specifications as a part of the subject matter to which the improvement relates. The only effect that we claim flows from the fact of so bolting or screwing down the back edge of the top plate is,

that it necessarily makes a rigid joint between the wood and the glass, which to a greater or less extent imparts its rigidity to its adjacent plates, and helps to differentiate the two cases, and tends to show the physical differences between the two cases as a whole, and to explain the reason why the joints between the top and side plates of the plaintiff's patented device are enabled to impart elasticity and resiliency to the several glass plates, and why this result cannot be accomplished in the other cases.

The defense at the hearing below had a good deal to say, and probably will again, in argument, that the phrase in the first claim of the patent "each plate being adapted to freely vibrate in its natural plane of vibration, and prevented by the felt cushion from imparting its vibration to the adjacent plates" is a mere statement of a result which is not patentable. Of course, results are not patentable; it is the means by which results are accomplished that is patentable. But, the results from certain arrangements are very frequently and properly inserted *in* the specifications and claims of the patent, for the purpose of limitation and explanation as to what a certain arrangement of certain physical things do, or will do, or what results will flow therefrom:

Stewart vs. Mahoney, 5 Fed. page 302;

In this case the patentee is limited to a structural arrangement by which each plate is adapted to freely vibrate in its natural plane of vibration, and

prevented from imparting its vibration to the adjacent plates. And it is apparent—even self evident—that this very expression would prevent the plaintiff from claiming as an infringement of its patent any show-case which would not accomplish that result; and it is equally clear and self evident, at least to us, that any device that would not accomplish these results would be a different device and could not anticipate the patented device, *for like means produce like results the world over*, and if the results are different the means must likewise be different. It is seldom that a case comes before the Courts where this rule becomes so pointed, so apparent and perhaps so important. The patented device accomplishes certain specified meritorious results. The anticipatory devices do not, and cannot produce the same, similar, or analogous results. Are the devices, or means used, the same? How can the results be different, and the means the same, or the means the same and the results different?

It may be that Whitcomb had some dim, indefinite and undeveloped idea of making a glass case with elastic joints, and to construct a case where the several plates might, or would, vibrate in their several planes of vibration without imparting the same to the adjacent plates; and that he was experimenting along this line without knowing what he would in fact produce. But, his own testimony would indicate that he never had conceived the idea of an elastic joint which would permit the

several plates to vibrate independently of the adjacent plates; certainly, he had not at the time of the making of the several anticipating devices now before the Court. The most liberal construction that can be given to his own testimony is: that he knew that the cases then on the market and in public use were not satisfactory, and that he was making blind efforts hoping that he might discover an improvement which would give better satisfaction to the trade.

We hope the Court will keep in mind, that we are now discussing the subject of anticipation and not one of invention; yet (so far) there has been no serious attack on the patent for want of invention, except as flows from the anticipatory matter. It will probably be conceded that the devices patented would involve invention were it not for the anticipatory matter.

In view of the importance of the question here, of identity of the means used by the patentee, and the means shown in the anticipatory device, we desire to return again to the question of identity as being the only real important question involved in the case, and to bring before the Court the authorities supporting our statement, that *“like means produce like results, and that unlike results prove different means.”*

What is to be construed as the essence of the patented invention? The answer seems clear and may be stated, as being the conception of the idea

of an elastic joint, whereby the several glass plates are each permitted to vibrate in its own plane without imparting such vibration to the adjacent plates. Unquestionably at least—so far as the evidence in this case discloses, or tends to disclose—this was a novel idea.

At Section 117 (1st Vol. of Robinson on Patents) the author states a rule that we shall contend for, (and from which we will quote at length as a matter of convenience to the Court) and attempt to support it by adjudicated authority, as follows:

“The intrinsic novelty of an invention is also sometimes indicated by the nature of the end which it accomplishes, when practically employed in the arts. In all departments of physical science, a given end is usually attainable through many different means. Seldom, if ever, in the material world does any effect rest so exclusively upon a single cause that no other operation of natural or artificial forces could produce the same results. Identity of end is, therefore, no proof of identity of means. Though an alleged invention achieves no other ends than have already been obtained by using other arts or instruments, the idea of means which it embodies may still be new, and a true product of creative skill. *The converse of this proposition, however, cannot be maintained.* Diversity of ends never results from uniformity of means. In every cause perpetually resides every effect which it is able to produce, and as the nature of the effect depends entirely on the nature of the cause, no change can ever take place in the one without a corresponding alteration of the other. Thus, while identity of end is no proof of identity of means, *diversity*

of end cannot exist without diversity of means, and every really new result furnishes in itself conclusive evidence that the cause by which it is produced is also new. Any invention, therefore, which accomplishes an end never before attained must be intrinsically new, and unless evidently a mere constructive union of known factors must, likewise, have originated in a new inventive act."

At the conclusion of this paragraph it is said: "The ends which indicate a novelty of means must be themselves actually new; by prior arts or instruments, but new results produced for the first time by that invention concerning whose intrinsic novelty the inquiry is made."

We think the rule, as here stated, and the whole of it is directly applicable to the case at bar.

The ends or results accomplished by the patented device (the essence of which we have just stated) are certainly absolutely new, for there is no evidence other than these anticipating devices themselves now before the Court bearing upon the question and, if we are correct in our conclusion that the evidence sufficiently establishes the fact that the anticipating devices did not have elastic joints which allowed the several plates to vibrate in their respective plane without imparting such vibration to the adjacent plates, then the conclusion of a diversity of means is established beyond peradventure. That this proposition is hoary with age and ripe with accumulated wisdom will be manifested by the cases hereinafter cited.

In the old case of *Furbush vs. Cook* (reported in 2 Fisher, 668, in the year 1857) Judge Curtis, who

was the author of the text book known as "Curtis on Patents," speaking of this subject says:

"And it is decisive evidence though not the only evidence, that a new mode of operation has been introduced, if the practical effect of the new combination is either a new effect or a materially better effect; or as good an effect more economically attained by means of the change made in the combination of the patentee. A new or improved, or more economical effect, attributable to the change made by the patentee in the mode of operation of existing machinery, proves that the change has introduced a *new mode of operation*, which is the subject matter of a patent."

That the novelty of the ends proves novelty of means runs through all the cases down to the present date.

In the case of *Sewing Machine Company vs. Frame* (24 Fed. Rep.) speaking of a similar case, near the bottom of page 597, the Court said:

"The change made in the old device was simple but effective. It produced a new and useful result. That invention was involved in accomplishing it, is manifest. Other intelligent and skillful mechanics, working towards the same end, failed to discover it."

This forcibly applies to the position occupied by Whitcomb.

In the case of *Grier vs. Wilt* (120 U. S. 412; 30 Law Ed., 712), at the end of the opinion in this case the Supreme Court, by Mr. Justice Gray said:

“The result being different from that in the plaintiff’s device, the mechanism is different and is not an equivalent of that of the plaintiff.”

In the case of *Mitchell vs. Tilghman* (86 U. S. 287; 22 Law Ed. 125) Mr. Justice Clifford in delivering the opinion said on page 144:

“Two things are not the same, under the patent law, when one is in practice substantially better than the other in a case where the second improvement is not gained by the use of the same means or known mechanical equivalents.” (Citing Curtis on Patents, 4th Edition, Sec. 320).

At Section 118 and Section 119 (Robinson on Patents, Vol. I) the author stated as follows:

“Novelty of end is ascertained by an examination of its nature, and by a comparison of its utility with that of other ends. The end to be accomplished is the satisfaction of a public want. The satisfaction of this want consists in a changed condition of affairs, in which the want entirely disappears. This changed condition is the effect produced by the invention, and is the ultimate end to which the means embodied in the invention tends. Novelty of end is thus a new condition of the things or persons upon which the action of, the means embraced in the invention terminates, and when in their condition novelty appears, a novelty of means may safely be presumed. This novelty of end exists whenever the change in the condition of affairs is a substantial, as distinguished from a formal, change; and the change is substantial when it removes a want hitherto wholly unsupplied, or satisfies it by a change essentially distinct from any previously known.”

“In cases where a change in the condition of affairs removes a want hitherto unsupplied, the character of the change itself becomes of little moment. No want, however trifling, is for the first time satisfied without the existence of a state of things which never has occurred before; and the production of this state of things requires the operation of a cause which, in itself or in its mode of operation, must be also new. This test of novelty of end is at once the simplest and the most reliable. Given a pre-existing want, and its removal, and the condition of affairs, on whose production the want ceases, must be new.”

In the case of *Fisher vs. Moore*, (1 Fisher, 544) the Court said:

“That the satisfaction of a want hitherto unsatisfied requires a new means” (as Weber said in his testimony: “he wanted an elastic joint and he got it”). “That inventive skill is indicated when the new art or article satisfies a long-felt want and is accepted as such satisfaction by the public:

Eames vs. Andrews, 122 U. S. 40;

Butler vs. Bainbridge, 29 Fed. Rep. 142;

Consolidated Valve Co. vs. Crosby Valve Company, 113 U. S. 157;

United Nickel Co. vs. California Electrical Works, 25 Fed. Rep. 475:

(and other cases cited under Section 119, Robinson on Patents, Vol. 1).

In the case of *Electric R. R. Signal Company vs.*

Hall Railway Signal Company (reported in the 114 U. S. 87; 29 Law Ed. 96), Mr. Justice Matthews delivering the opinion, it was held:

“To constitute identity of invention, and therefore infringement, (or anticipation) not only must the result obtained be the same, but in case the means used for its attainment is a combination of known elements, the elements combined in both cases must be the same, and combined in the same way, so that each element shall perform the same function; provided, however, that the differences alleged are not merely colorable, according to the rule forbidding the use of known equivalents.”

Again, when the difference between the old and the new conditions is not evident upon their face, it may be inferred from their comparative utility. Wherever any want, already partially supplied, after some further change in the conditions of affairs is fully satisfied and ceases to exist, the difference in the usefulness of the two forms of satisfaction is often treated as sufficient evidence of substantial difference in the conditions. On the same principle a form of satisfaction, whose superiority to others is established by the fact that in its practical enjoyment by the public it has superseded every other, is usually regarded as a new condition, unless upon its face the contrary appears. If, on account of cheapness or any other greater ease of access by the public, it shows itself more useful than the old, this also, though of little consequence when other indications of novelty or similarity are present, may

be sufficient to denote such a substantial variation as requires an actual difference in means.

(*Robinson on Patents, Vol. 1, Sec. 121, page 173*).

At Section 122 (*Robinson on Patents Vol. 1*) it is stated: that the unsuccessful efforts of others to produce the same results also indicates not only novelty of the end, but the necessity of inventive skill in the creation of the means whereby it is attained. The same rule is held in the following cases:

Wilcox vs. Bookwalter, 31 Fed. Rep. 224;
Celluloid Manufacturing Co. vs. American Zylonite Company, 28 Fed. 195;
Dudgeon vs. Watson, 29 Fed. Rep. 248;
Davis vs. Fredericks, 19 Fed. Rep. 99;
(and many other cases that might be cited).

It has also been held that:

“Whenever the utility is proved to exist in any great degree, a sufficiency of invention to support the patent must be presumed. These remarks are pertinent to the present case, and they are obviously founded in good sense:
(4 Fisher, 532.”

And again, it has been held in numerous cases as follows:

“That an increase of utility in the effect pro-

duced by an invention is evidence of novelty in such effect, and so of novelty and inventive skill in the invention itself:

Roberts vs. Schreiber, 2 Fed. Rep. 855;

Smith vs. Woodruff, 6 Fisher, 476:

Again, it has often been held that the unsuccessful efforts of others to accomplish the same result indicates that the means by which the present inventor accomplishes it are the fruit of inventive skill:

Wilcox vs. Bookwalter, 31 Fed. 224;

and many other cases cited in note I of Section 122, bottom of page 175 and page 176).

“That prior unsuccessful efforts of others indicate discovery of new factors by the successful inventor, see *Adams, etc. vs. Rathbone*, 26 Fed., 262, and many other cases cited in the last mentioned note.

In view of the fact hereinbefore stated, that the alleged anticipating device will not accomplish the results, or perform the functions of the patented device, the case of *Farmers Mfg. Company vs. Spruks Mfg. Company* (127 Fed. 691) is directly in point. It is there said—amongst other things:

“A patent for a device which fails to accomplish the desired end, is not an anticipation of one for a device which successfully accomplishes it.”

This is simply a further exemplification of the

rule: that like produces like and that where the results are different the means must likewise be different.

The opinion of the court in this case presents a strong argument in support of our contentions in the case now before the Court, and a very forcible quotation from the celebrated Barbed Wire Case, in 143 U. S. 275, appears; and for the convenience of the Court we will here insert it:

“It is true that the affixing of barbs to a fence wire does not apparently give a wide scope to the ingenuity of the inventor; but, from the crude device of Hunt to the perfected wire of Glidden, each patent has marked a step in the progress in the art. The difference between the Kelly fence and the Glidden fence is not a radical one; but, slight as it may seem to be, it was apparently this which made the barbed wire fence a practical and commercial success Under such circumstances, Courts have not been reluctant to sustain the patent to the man who has taken the final step which has turned a failure into a success. In the law of patents, it is the last step that wins. It may be strange that, considering the important results obtained by Kelly in his patent, it did not occur to him to substitute a coiled wire in place of the wire-shaped prong, but evidently it did not; and to the man to whom it did ought not to be denied the quality of invention. There are many instances in the reported decisions in this Court where the monopoly has been sustained in favor of the last of a series of inventors, all of whom were groping to attain a certain result, which only the last one of the number seemed able to grasp. Conspicuous among these is the case of *Loom vs. Higgins*,

105 U. S. 580; 591 (26 L. Ed. 1177), where an improvement in looms for weaving pile fabrics, consisting of such a new combination of known devices as to give to a loom the capacity of weaving 50 yards of carpet a day when before it could only weave 40, was held to be patentable. It was said by the Court, in answer to the argument that the combination was a mere aggregation of old and well-known devices, that 'this argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed—one which would occur to any mechanic skilled in the art. But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not for years occur in this light to even the most skillful persons. It may have been under their very eyes. They may almost be said to have stumbled over it, but they certainly failed to see it, to estimate its value, and to bring it into notice. . . . Now that it has succeeded, it may seem very plain to anyone that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though, perhaps, not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention'.

So, in *Consolidated Valve Company vs. Crosby Valve Company* (113 U. S. 157, 179; 6 Sup. Ct. 513, 525; 28 L. Ed. 939) it was said:

'That Richardson's invention brought to success what prior inventors had essayed and partly accomplished. He used some things which had been used before, but he added just that which was necessary to make the whole a practically valuable and economical apparatus. The fact that the known valves were not used, and the speedy and extensive adoption of Rich-

ardson's valve, are facts in harmony with the evidence that this valve contains just what the prior valves lack, and go to support the conclusion at which we have arrived on the question of novelty.'

In *Smith vs. Goodyear Dental Vulcanite Company*, (93 U. S. 486-495; 23 L. Ed. 952) it was said by the Court:

'We do not say that the single fact that a device has grown into general use, and has displaced other devices which had previously been employed for analogous uses, establishes in all cases that the later device involves a patentable invention. It may, however, always be considered; and, when the other facts in the case leave the question in doubt, it is sufficient to turn the scale'."

In *Keystone Manufacturing Company vs. Adams*, (151 U. S. 144; 14 Sup. Ct. 297; 38 L. Ed. 103) the Court says:

"Where a patentable invention consists of an improvement of a machine previously existing, it is not always easy to point out what it is that distinguishes a new and successful machine from an old and ineffectual one; but when, in a class of machines so widely used as this in question, it is made to appear at least, after repeated and futile attempts, a machine has been contrived which accomplishes the result desired, and when the Patent Office has granted a patent to the successful inventor, the Court should not be ready to adopt a narrow or astute construction fatal to the grant."

In *Smith vs. Goodyear Dental Vulcanite Company*, (93 U. S. 598; 23 L. Ed. 952) the Court says:

"The patent itself is *prima facie* evidence

that the patentee was the first inventor. At least, it casts upon him who denies it the burden of sustaining his denial by proof. We do not find such proof in the case."

In *Topliff vs. Topliff, et al.*, (145 U. S. 156; 12 Sup. Ct. 825; 36 L. Ed. 658) the Court says:

"It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted nor actually used, for the performance of such function."

The simplicity and apparently obvious nature of East's device seem to be the chief argument against its patentability, but the books are full of cases where patents have been sustained for changes in methods which seem equally simple. The substitution of the hot blast for the cold in making iron; the use of a flame of gas to finish cloth, rather than the flame of oil; the substitution of pit coal for charcoal, and of anthracite coal for bituminous coal, in certain processes—, are some of them.

It will be noted that in the Barbed Wire Case the Court used the expression that: "In the law of patents it is the last step that wins." This has since been used quite frequently in the discussion of questions of this kind, and it is peculiarly applicable to the case at bar; as it appears, that in the construction of all-glass cases the elastic joint proposition is the last step that so far has been utilized in the art.

In the case of *United Shirt & Collar Company vs. Beattie* (149 Fed. 736) the Court said:

“A patent for a successful machine is not void for anticipation, because a prior machine intended for a different purpose may possibly be capable of use as an inefficient substitute for the later machine.”

In the case of *Wales vs. Waterbury Mfg. Company* (59 Fed. 285) the Court said:

“One who takes old devices with material defects and—retaining the desirable features, adapts them by novel modifications to new and varying conditions so as to produce an article superior to all others, is not anticipated by such prior devices.”

Also see:

Mfg. Co. vs. Carey, 147 U. S. 626;

Thomson vs. Bank, 53 Fed. 250;

Ansonia Brass & Copper Co. vs. Electrical Supply Co., 144 U. S. 11;

In the case of *St. Louis Street Flushing Machine Company vs. American Street Flushing Machine Company* (156 Fed. 574) the Court, commenting upon a similar question, used the following language:

“It is not necessary that a result before unknown should be brought about, but it is sufficient if an old result is accomplished in a new and more effective way. If the value and effectiveness of a machine are substantially in-

creased, the new combination of old elements which does it is patentable:"

Citing:

Loom Co. vs. Higgins, 105 U. S. 580, 591; 26 L. Ed. 1177;

Cantrell vs. Wallick, 117 U. S. 689, 694; 6 Sup. Ct. 970; 29 L. Ed. 1017;

Anderson vs. Collins, 122 Fed. 451;

In the case of *Boyer vs. Keller Tool Company* (127 Fed. 138) the Court said:

"Where the patentee has supplied features that have brought success, where others who preceded him failed, the Court will not scan narrowly the means by which it has been attained. The mechanical elements may be old, and to a certain extent the result accomplished but where the combination is new, the efficacy attained, being much in advance of what has gone before, suggests—if it does not prove—the existence of inventive skill; (and cited in support thereof a number of cases as follows):

Sessions vs. Romadka, 145 U. S. 29; 12 Sup. Ct. 799; 36 L. Ed. 609;

Hobbs vs. Beach, 180 U. S. 383; 21 Sup. Ct. 409; 45 L. Ed. 586;

Taylor vs. Sawyer Spindle Co., 75 Fed. 301; 22 C. C. A. 203;

Stevenson vs. McFassell, 90 Fed. 707; 33 C. C. A. 249;

National Brake Beam Co. vs. Interchangeable Brake Beam Co., 106 Fed. 693; 45 C. C. A. 544;

In the case of *Starr Brass Works vs. General Electric Company* (111 Fed. 398,) the Court said:

“Where the departure from former means is small, yet the change is important, the doubt as to whether the inventive faculty has been exercised has to be weighed in view of the fact that the device in question has displaced others; and this may decide the issue in favor of invention, especially where another inventor of conceded ability has been working to attain the same end and had failed. The change ‘seems simple enough now but it was the first to combine comprehension of the problem to be solved with a practical arrangement of parts for its solution’;

See also:

Buchanan, et al. vs. Perkins Electric Switch Mfg. Co., 135 Fed. 90;

In the case of *Eldred vs. Kirkland* (130 Fed. 342) the Court said:

“Where the patentee is the first to produce a self-igniting and self-extinguishing fluid burning cigar lighter and a prior patentee, while seeking the same result failed, such prior patent cannot seriously limit the scope of the later patent, but offers mute but persuasive tribute to the ingenuity of such later patentee.”

See also:

Curtis vs. Atlas Co., 136 Fed. 222;”

In the case of *Davis vs. Fredericks* (19 Fed. 99) the Court said:

“Plaintiff’s patent was for an improvement in scoops. The first scoops were made in pieces and fastened together after being shaped. Plaintiff’s scoop was made in one piece. To hit upon the necessary pattern for the sheet metal to produce this result must have required calculation and experiment beyond the practice of mere mechanical skill and good workmanship. It seems to be entitled to be classed as inventive. A new thing was produced, better for some purposes than had been produced before, although many skilled workmen had been practicing the making of those known before and making as good as they could without reaching this. He hit upon this while no one else did, although it appears to be easy of accomplishment when seen. This success seems to be within the benefits of the patent law.”

A United States patent in due form is presumed to be valid and is *prima facie* evidence of its own validity; also that the invention is a new and useful one, and that the patentee was the first and original inventor of the thing patented, and every reasonable doubt should be resolved against him:

Smith vs. Goodyear, 93 U. S. 486;

Lehnbeuter vs. Holthaus, 105 U. S. 94;

One who asserts the invalidity of the patent for any of the statutory reasons at least, has the burden of proof cast upon him, and he must establish his anticipatory matter beyond a reasonable doubt.

In *Williams vs. American*, 86 Fed. 642, decided by the Court of Appeals of the Seventh Circuit, it is said:

“Anticipation should not be found in prior devices in the art to which the patent belongs unless they are of such a character as to furnish clear, if not unmistakable suggestion, of the improvement in question”:

See also:

Hopkins on Patents, Vol. 1, Sec. 205;

What was there in these so-called Whitcomb cases to suggest the improvements patented? There was certainly nothing to suggest any elastic or flexible joint, or the idea of having any sort of a joint which would allow the respective glass plates to vibrate in their respective planes of vibration, and thus prevent breakage. Certainly the bolting down of the top plate to the back frame would not convey any such suggestion.

Again it is a familiar rule, that the accomplishment of the same results is not anticipation, unless it is done by the same means in substantially the same way. This rule is not strictly applicable to this case, because the results are not the same and, of course, as hereinbefore shown, the means must be different.

In *Simonds Rolling Machine Co. vs. Hathorn Mfg. Company, et al.* (93 Fed. 958) the Court said:

“On a question of anticipation, if the identity of methods and results is doubtful, the doubt must be resolved in favor of the successful patentee, who—in a practical way—has materially advanced the art”:

See also:

Hopkins on Patents, Vol. 1. Sec. 211.

In *Ideal Stopper Co. vs. Crown Cork & Steel Company*, (131 Fed. 244) the Court said:

“The line which separates invention from mechanical skill is at best a narrow one, and the difficulty of demarkation in this case is enhanced by the fact that of necessity, we look upon the alleged anticipation with eyes instructed by the patent in suit and other subsequent patents, and must take care that we do not in such light reconstruct the alleged anticipation so as to see in it the possibilities which may seem very obvious now, but which may not have been disclosed by the patent itself.”

So looking backward from the patent in suit, it might appear easy to say: well, all you have to do with the patented device is to use ordinary cement instead of Whitcomb's semi-liquid drug composition which he said was not cement, but that he called it cement instead of calling it “dog”, which he might have done but didn't, and then you would have the “Weber patented device” with its elastic joints and so constructed that the respective glass plates could vibrate in their own natural plane of vibration, and leaving out the bolts in the top plate and inserting cement and felt in the joint along the wooden frame, you might then have all the benefits of the plaintiff's patent. It may be argued, that this would be very easily done, but the trouble is: that Whitcomb didn't know how to do it, and didn't

do it, and consequently did not accomplish the results of the patented device.

In the case of *Coffin vs. Ogden*, 85 U. S. 120; 21 L. Ed. 821, the Court said:

“The invention or discovery relied upon as a defense, must have been complete, and capable of producing the result sought to be accomplished; and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt must be resolved against him. If the thing were embryonic or inchoate; if it rested in speculation or experiment; if the process pursued for its development had failed to reach the point of consummation, it cannot avail to defeat a patent founded upon a discovery or invention which was completed. The law requires not conjectures but certainty. If the question relate to a machine, as thus exhibited, the conception must have been clothed in substantial forms which demonstrate at once its practical efficiency and utility.”

It seems to us that this case is absolutely conclusive of our contention in the case at bar. Under the authority of this case, it was incumbent upon the defendant to show:

(a) That the anticipatory devices were complete and capable of producing the results sought to be accomplished by the patent; in other words: it was incumbent upon the defendant to show beyond a reasonable doubt, that the joints in the Whitcomb case were elastic;

(b) That the several glass plates could, would

and did permit that vibratory and flexible action in their respective planes of vibration without imparting the same to the adjacent plates; in other words; it was incumbent upon the defendant to show beyond a reasonable doubt, that the anticipatory structures accomplished the same results as the patented device.

These things are not to rest in conjecture, but they must be established by the defendant, by competent evidence of sufficient weight to satisfy the mind of the Court beyond a reasonable doubt.

We say: that the defendant absolutely failed to produce any such evidence in the case, and that all the testimony upon the subject goes to show that the Whitcomb cases did not have elastic joints, and that they did have rigid joints; and that, as a necessary consequence thereof, the several glass plates could not vibrate in their respective planes of vibration without transmitting such vibration to the adjacent plates and, therefore, could not produce the results sought by the patentee.

In the case of *Cantrell vs. Wallick* (117 U. S. 689; 29 L. Ed. 1017) the Court said:

“Not only is the burden of proof to make good this defense upon the party setting it up, but it has been held that ‘every reasonable doubt should be resolved against him’.”

See also:

Busch vs. Jones, 184 U. S. 598.

In the case of *McNeely vs. Williams* (96 Fed. 978) the Court said:

“To sustain the defense of anticipation, it is necessary that the anticipatory matter should clearly show the invention subsequently patented, in such manner as to enable any person skilled in the art or science to which it relates to construct, and practically use, the invention for purposes contemplated by the subsequent patent.”

Can anyone successfully maintain that there was enough in these anticipatory devices, with their rigid joints and bolted down top plates, to suggest the elastic cemented felt joints described in the patent?

(See also:

American vs. Fiber, 90 U. S. 566).

In the case of *Edison vs. Electric* (66 Fed. 309) the Court said:

“A prior device which in some degree performs the function of the patent in suit, but the purpose and function of which was wholly different, and which in no way pointed out the function of the device in suit cannot be construed as an anticipation.”

In the case at bar the anticipatory device in no way pointed out the function of the patented device in suit. Consequently, in view of the law as we have attempted to show, we insist that a rigid joint is not an elastic joint; that glass plates which can-

not freely vibrate in their respective planes of vibration without imparting the same to the adjacent plates, but which are prevented from so doing by the rigid joints, re-enforced (as in this case) by the bolting down of the back edge of the top plate to the wooden frame, cannot possibly be an anticipation of an elastic joint made as described in the patent and producing the results mentioned therein.

VI.

OPINION OF JUDGE RUDKIN IN DISMISSING A BILL.

While it is somewhat unpleasant to criticize the opinion of a very learned Judge of high standing, yet in this case we are compelled to urge that the Judge did not grasp the facts, nor the law of the case, and by some means was lead into error as to the facts which necessarily resulted in erroneous conclusions. The Judge entirely misunderstood the testimony as to how the Whitcomb cases were made.

In his opinion, on page 59, in describing these structures, the Judge said:

“The base and back frame work of the Whitcomb cases were made of wood, while the ends, front and top were of plate glass. The two end plates were imbedded in the wooden base and in the wooden frame work at the rear. The front plate was likewise imbedded in the wooden base and *cemented* to the end plates with a strip of felt between the plates and the joint.”

We do not care to indulge much in mere verbal criticisms, but in this case when the Judge speaks of a strip of felt between the plates and the joint, he was inaccurate, because the felt is not between the plates and the joint, but the felt and cement is what makes the joint by being placed between the edges of the respective plates, constituting the joint in question. But, the more serious and fatal mistake was in saying: that the plates in the Whitcomb cases were in any manner cemented together. The Judge evidently forgot, that Whitcomb testified point blank on page 31 of the Transcript (hereinbefore quoted):

“The glass plates in these Joplin and Federmann cases were fastened together with a preparation that I made myself; it was not ordinary cement. I would go into a drug store and get the druggist to give me some drug and fix up some stuff and *call it cement*; I might have called it something else, but did not; I might have called it ‘dog’, but didn’t. . . . These glass plates in the Joplin cases were fastened together with a preparation I got up myself, and called it ‘cement’;”

and on page 32 of the Transcript he says:

“I made it myself; it was a special material—something I worked out myself; naturally didn’t publish it; it was a special preparation which I called ‘cement’. It was a soft material—something like paint; we could pour it from one vessel to another. I suppose it would have a tendency to harden, naturally most anything would evaporate or harden. It permeated the felt at first, etc.”

The Judge was, no doubt, misled in the use of this word "cement" because, after this explanation of what material he, Whitcomb, did use in constructing these cases, he used the word "cement" (everybody understanding that he meant this semi-liquid material that was like paint, and which could be poured from one vessel to another and not cement in its true sense, or in any sense). Right here is where the trouble arose; the material that he did use permeated the felt and made a rigid joint, but the Judge in his opinion treats it as the same material (cement) used by the patentee, and treats the whole case as if the joints were made in the same way and produced precisely the same results.

Later on (at page 59 of the transcript) the Judge says:

"The Weber patent cases are in all respects similar to the Whitcomb cases with the single exception that cement is substituted for metal screws for the purpose of fastening down the rear of the top plate," etc.

Now this is clearly erroneous. Then on page 60, the Judge says:

"The Weber patent must fail for two reasons:

First: Because the mode of fastening or joining glass to wood is not covered by the claim in the Weber application (meaning the Weber patent)"

Now we never claimed, and do not now claim,

the claims of the patent do in terms cover the fastening or joining of the back edge of the top plate to the wooden frame. We have only referred to that as a feature which marked a distinction between the two cases as a whole, and as one thing which assisted to a greater or less extent in making the joints of the Whitcomb cases rigid instead of elastic and flexible, and as tending to re-enforce our proposition, that the respective glass plates of the Whitcomb cases could not, and were not intended to, vibrate in their several planes of vibration.

On page 60, as another reason for denying plaintiff the relief sought, the Judge refers to the statement in the claims: that in cases where screws were used the plates cannot vibrate in their respective planes of vibration without imparting its vibration to the adjacent plates; and the Court then holds, that this was a mere result which is not patentable. The conclusion is correct that results are not patentable, but (as we have already adverted to at some length) while the result is not patentable it is absolutely determinative of the question of identity, because "like produces like, and where the means are the same the results must be the same, and where the results are different the means cannot be the same. As the question to be determined is the identity of one device with the other, it is evident that the Judge failed to recognize this well established and well known elementary rule in determining this question of identity. Again, when the Court stated: "that the substitution of cement

for screws would occur to the rudest and most unskilled mechanic, and that such a change would not call for the exercise of inventive genius or creative faculty," it stated a broad proposition that is not involved in the case, except so far as the attachment of the back edge of the top plate to the wooden frame is concerned, which (as we say) is not specifically covered by the claims of the patent. But, whether such a substitution of cemented felt joints making an elastic joint, instead of the use of screws throughout the whole device making rigid joints, would suggest itself to the unskilled mechanic, and therefore would not require the exercise of the inventive faculty, is altogether another question, and is not involved here, because the anticipatory showcases were not made with screws, except along the back plate, and no question of equivalency or of invention is involved so far as the fastening of the back edge of the top plate to the wooden frame is concerned.

We cannot see the application of this reasoning, because there is nothing in the patent to suggest to anyone that the substitution of cement along the back rail for the screws was the new idea, or the thing, or device, or process patented.

The Judge then on page 62 quotes a very familiar rule, and one that is of almost universal application, in determining this question of infringement or anticipation, which is as follows:

"That which infringes, if later, anticipates, if earlier."

This rule is stated in several forms; one way of putting it is as follows:

“If one invention infringes another if later, it anticipates it if earlier.”

There are many United States Supreme Court cases affirming this rule, and there is no question about its correctness; but let us see how it works in this case.

The patent cases have elastic flexible joints made with felt and ordinary cement in all the joints, the cement not permeating the felt; the result being that the several plates making up the patented glass cases are enabled to freely vibrate in their respective planes of vibration without imparting their vibration to the adjacent plates. There is no contention but that these are the results of the patented structure, as described in the patent itself. There is no dispute, but that all of the objects or purposes of the patented device, as stated in the specification, are accomplished by this method of constructing an all-glass show-case. Now let us turn to the Whitcomb cases; they are glass show-cases; the joints uniting the glass plates are made with felt and a semi-liquid paint like material, which can be poured from one vessel to another, and which when applied permeated the felt and made a rigid joint, and to increase, or insure, the rigidity of the joint the back edge of the top plate was bolted down tight to the wooden frame, which would tend to prevent any vibration in the top

plates, but should there be any vibration in the plate caused by jars or knocks it would be instantly transmitted to the adjacent plates.

Now to carry out our argument, we will suppose that the Whitcomb cases were subsequent to the patent and that Weber had sued Whitcomb for infringing his patent. Weber would introduce his patent, and the patent itself would be *prima facie* evidence that his structure was one, the objects of which were to produce an elastic or flexible joint, whereby the respective plates were permitted to vibrate without imparting their vibratory action to the adjacent plates; at this point he rests. Whitcomb then opens his defense of non-infringement, by showing that he did not use cement in his joints, but a semi-liquid drug compound made up by himself, which permeated the felt and which could be poured from one vessel to another like paint; the result of which was a rigid joint, and that the several glass plates could not vibrate in their respective planes of vibration without imparting the same to their adjacent plates; in other words: that any vibration that might take place by reason of any strain or jar would necessarily be imparted to the adjacent plates. He then adds to his proof the fact, that in order to make it sure that these several joints were rigid and that the plates could not vibrate, as above described, he bolted down the back edge of the back plate to the wooden frame in a tight solid manner, so that any vibration which might take place, would necessarily be imparted to

the adjacent plates and throughout the whole device.

Could it be reasonably said, that a case of infringement had been made out. The defendant would appeal to the law, as we have stated it in this brief, and show that as the results were absolutely different, and being so, the means were necessarily different, and that, therefore, there could be no infringement. The defendant would establish beyond a doubt that he did not obtain the results sought by the patentee; that he had none of its advantages or benefits, and could not invade any of his patented rights whatever. Consequently, we say: that the rule suggested by the Court—while correct in itself—was not properly applied, because it could not be held that the Whitcomb cases (if subsequent to the plaintiff's patent) could have been any infringement of the patent.

It is too well known to need any citation of authorities other than what we have already made, that one device which does not accomplish the same results as another device is not the same thing in the eyes of the patent law, and would not, and could not, infringe it.

In conclusion permit us to say: that, while this invention seems to be small and narrow, it is of great importance (much greater than it would seem to be at first blush). Under the protection, presumed to have been given by the patent, plaintiff has invested large sums of money and built up

quite an extensive and profitable business, relying upon the protection given by the patent. It has gone into extensive use, and wherever brought in competition with the prior structures has, to a large extent superseded them. As Mr. Edwards (who was a witness for the defendant) said on page 41 of the Transcript:

“I think when the proper kind of cement and felt are used under the proper conditions, that it makes an ideal joint.”

Mr. Edwards had been making these cases for four (4) or five (5) years, and thoroughly understood the business and the difference between the patented joint so to speak, and other methods of uniting the plates together of a show-case.

The importance of this case to the plaintiff must be our excuse for so lengthy a discussion of points which seem to be so plain to us, but which we failed to make plain to the Court below.

For the reasons herein given, we earnestly insist that the judgment be reversed.

All of which is respectfully submitted:

SCRIVNER & MONTGOMERY,
Attorneys for Appellant.

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United States
Circuit Court of Appeals

For the Ninth Circuit
MAY TERM, 1914.

DIAMOND PATENT COMPANY,
a Corporation,
Plaintiff and Appellant,
vs.

S. E. CARR COMPANY, a Corporation,
Defendant and Appellee.

APPELLEE'S ANSWER BRIEF.

In this action the plaintiff alleges that the defendant has infringed its Patent No. 801,944, for an improvement in showcases, applied for October 3, 1904, and issued October 17, 1905, to Fred Weber and thereafter assigned to the plaintiff. It was stipulated that showcases in use by defendant were substantially like the patented cases and no controversy arises until the defenses are reached.

The defendant contends that the patentee was not the original or first inventor of the thing patented and that the thing patented had been in public use and on sale in this country for more than two years prior to the application for the

patent sued upon. These defenses are statutory and are commonly known as prior invention and prior use and are to be found in subdivisions 4 and 5 of U. S. R. S. 4920, as follows:

4. "That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented; or,

5. "That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public."

Then, in addition, the question whether the improvement patented involved invention is raised.

The plaintiff's rebuttal is all directed to an attempt to distinguish between the improvement patented and the anticipating showcases, it being in effect conceded that the anticipating cases were made in the manner and at the times shown by the testimony.

Based upon the facts, the defendant contends that it has proven beyond any doubt whatever that the patentee was not the original or first inventor of the thing patented and that showcases made identically in accordance with the claims of the patent were sold and used in this country considerably more than two years prior to the patentee's application for patent. As a matter of law the defendant contends that the so-called reasonable doubt rule has no application

to this case; that a portion of each of the claims of the patent cover a function and that a function is not patentable; that the claims of a patent are strictly construed and limit and restrict the rights of the patentee and the claims cannot be enlarged or construed to include anything not clearly within the language thereof; that the claims of the patent in suit include simply the joints of a showcase where glass is joined to glass and nothing else and do not cover any portion of the showcase where glass is joined to wood; that the proof of the use by a single individual of a single showcase made substantially in accordance with the claims of the patent and more than two years prior to the application therefor is under the law sufficient to invalidate the patent both on the ground of prior use and prior invention. With this statement of the case and our contentions we will proceed to a consideration of the case on its merits.

THE FACTS OF THE CASE

In the first place we are unable to find anything in the transcript warranting plaintiff's assertions in its brief as to the state of the art at the time of the application for the patent. No references are made to the record in support of its statements. This is characteristic of its brief. Without reference to the record, facts are stated and assumed that do not appear in the

record. Very many of the contentions of plaintiff are based on an assumption of facts which do not in fact exist. Under such circumstances it was wise for it not to attempt to support its statement of the facts by reference to the record. As the status of the art is of little if any consequence, so far as the defenses of prior use and prior invention are concerned, we will not give it further attention. It is sufficient to call attention to the fact that the record does not disclose the prior art. Whitcomb stated that *he* had made certain kinds of cases, but that is far short of proving the prior art.

It may be well to determine at once just what the patent covers. For this we can only look to its claims, which are as follows:

1. "A structure comprising a plurality of glass plates, the edges of which are spaced from the adjacent plates, a felt cushion filling the space between the adjoining plates, the plates being cemented to the felt, each plate being adapted to freely vibrate in its natural plane of vibration, and prevented by the felt cushion from imparting its vibration to the adjacent plates.

2. A structure comprising a plurality of glass plates, an unconfined edge of one plate nearly but not quite meeting another plate also with unconfined adjacent edge, an elastic material filling the space thus existing between the nearest adjacent surfaces of the plates, said plates being attached to the elastic material, whereby the plates by reason of their

unconfined edges and the intervening elastic material can each vibrate or move in any direction independently."

Later on it will be contended with authority in point that all of the first claim following the comma after the word felt and all of the second claim following the comma after the word material is invalid as being functional and not patentable. From this it appears that the patent merely covers a structure consisting of glass plates cemented together with felt or elastic material in the joints between the glass. It does not cover the combination of glass with wood or other material and is confined strictly to the joining of glass to glass. With this in mind in connection with a showcase it is clear just what is covered by the patent. The front and end plates of glass of a showcase are joined to the wood frame at the base and the end and top plates are fastened to the wood at the rear as all the cases have wood back and base frame.

Having gotten the patented thing in mind, we can now look to the anticipating cases. At this point we want to call attention to the findings of the lower court incorporated in its opinion as set up on pages 58 to 63 of the record. Judge Rudkin found that the anticipating cases were made as follows:

"The base and back framework of the Whitcomb cases were made of wood, while

the ends, front and top were of plate glass. The two end plates were imbedded in the wooden base and in the wooden frame work at the rear. The front plate was likewise imbedded in the wooden base and cemented to the end plates with a strip of felt between the plates at the joint. The top plate was cemented to the front and end plates in the same manner and fastened to the wooden frame work at the rear by means of metal screws inserted through holes drilled in the glass at each rear corner of the eight foot cases with an additional screw in the center of the ten foot cases. A strip of felt was placed between the plate glass and the wood at the rear of the case.

The cases manufactured under the Weber patent are in all respects similar to the Whitcomb cases with the single exception that cement is substituted for metal screws for the purpose of fastening down the rear of the top plate. In other words, in the Weber case the top plate was cemented to the wooden frame work at the rear just as glass is cemented to glass in other parts of the case, while metal screws are used to hold the rear of the top plate of the Whitcomb case in place."

While that finding is not conclusive in this court it is entitled to much weight. The court in making that finding had before it a volume of evidence quite ten times what is before this court including many details which of necessity cannot be brought to the attention of this court. The court finds that in the anticipating showcases the front plate of glass was cemented to the end plates with a strip of felt in the joint between

the plates and that the top plate was cement to the end and front plates in the same manner the top plate being fastened to the wood frame at the rear by means of screws through holes in the glass, a strip of felt being inserted between the glass and wood at the rear. That that is the identical construction set forth in the claims of the patent cannot be successfully controverted. That the finding of the court on the question involved is the only reasonable deduction from the evidence will presently appear.

No question has been raised that these anticipating showcases referred to in the record as the Cooper or Joplin cases and the Federman cases were not made and put into use more than two years prior to the application for the patent, and further space will not be taken as to the time of making and putting into use of these anticipating cases save to say that the ten cases for the Cooper Drug Company at Joplin, Missouri, were installed during November, 1899 (pgs. 30, 31, 44 and 51), and the Federman cases were installed during April, 1900 (pgs. 32 and 43).

The first witness giving testimony concerning the construction of these anticipating cases was W. G. Whitcomb, of Kansas City, Missouri. He testified that he had practical experience as a mechanic in making showcases for thirty years; that he had been operating as the Whitcomb Cabinet

Company for more than ten years (p. 30) (page references, unless otherwise noted, will refer to the Transcript of Record), as a manufacturer of show-cases; that among others he made showcases "with felt joints cemented" (30); that he put in ten of these cases for the Copper Drug Co., at Joplin, Missouri, and made some for Federman about the same time; that these cases are all in existence now (31); that the Joplin cases had "felt joints" used with cement (32); that these felt and cement cases were "constructed by putting the cement along the edge of the glass and then lay the felt on and then put cement on top of the felt and put the glass on" (page 42); that he made one of these cases for H. J. Ernest in 1899, which was made "with felt stuck to the edge of the end glass and then put cement on the felt, and simply put up the front glass and the same thing with the top"; that "the front, top and end joints were put together with felt and cement clear along the edges" (page 43); "that he made five of these cases for Mr. Federman, constructed with felt and cement the same as the Ernest case, these cases were delivered to Mr. Federman in April, 1900, and he has them yet" (page 43); "that in some of these elastic cases made with the cement and felt construction he bored holes through the top glass at the back top corners and put a screw through the holes and into the back wood frame, some of them were made without these screws, the two end joints and

front joints and the front corners where the glass is put together did not have any holes and were held together by the cement; that he began experimenting with these felt joint cases in 1896 or 1897; that he made several of these cases before selling any, and first tried using glue for the adhesive to adhere the felt to the glass and found out glue would not do as it broke and chipped the glass, then he tried shellac and found that would not work and finally he used a substance made up of ingredients that he would get at a drug store (pg. 43); * * * * that the Federman cases were made by sticking the felt to the glass and then put cement on the other side of the felt and lay the glass on; * * * * that these Joplin cases were constructed with felt in the joints between the glass with an adhesive substance on either side of the felt adhering it to the glass; that the cement used in these cases was a preparation he got up himself (pg. 44); * * * * that he remembers the construction of the ten cases delivered to the Cooper Drug Company, at Joplin, Missouri, very well, as he went down and set them up and worked on them at night; that the joints were made with felt and cement, cement on the edge of the glass and then felt and then cement and the glass laid on" (pg. 45).

Even with the testimony of this single witness there is no room for doubt as to the construction of the anticipating cases made and put into

use in 1899 and 1900 and still in use, but that is only a portion of the record.

William M. Federman, another absolutely disinterested witness, who got the so-called Federman cases from Mr. Whitcomb in April, 1900, gave instructive testimony on the question of the construction of his cases. On pages 45 and 46 he testified as follows:

“That in April, 1900, Whitcomb installed five showcases in his store at 904 Main St., Kansas City, Missouri, said cases having been used by him ever since in the same location; that said cases were made with felt between the glass and fastened together with some adhesive substance; * * * that the strips of green felt are still there on the edges of the glass and can be seen readily; * * * that said cases have been in continuous use since installed in 1900; * * * that whatever elasticity followed from the use of felt in the joints between the glass existed in his cases; that his cases were made by putting a strip of felt having an adhesive substance on either side of it in the joints between the glass and the different plates of glass thus held together and that any elasticity resulting from that method of construction existed in his cases.”

Henry W. Jackson, the licensee of plaintiff in Kansas City, Missouri, and thereby interested in the result of this case, testified on pages 47 and 48, in corroboration of Whitcomb by saying “that he knew without being told that Mr. Whitcomb

had been making these all glass showcases, as he had seen such cases made by Whitcomb running back a dozen or thirteen years ago, and knew two or three places where Whitcomb had put in the cement felt, all-glass showcases.”

William E. Price of Joplin, Missouri, who was one of two partners in the Cooper Drug Company at the time said company purchased the ten anticipating cases from Whitcomb in 1899 and continued such partner and to use said cases until just prior to giving his testimony in January, 1913, testified on behalf of the plaintiff on pages 51 and 52, as follows:

“That said cases were shipped to Joplin, knocked down and were set up in the store by Mr. Whitcomb himself; the back frame was separate from the base; that they screwed the back frame onto the base and then set the end plates of glass in grooves in the base and back frame, then put glue on the edge of these end plates of glass and then put on a strip of felt over the glue and then put glue on the felt and then put on the front plate of glass and then did the same with the top plate of glass; that all these cases are still in use in the store where they were installed and have been in continuous use ever since installation; that this glue, felt and glue construction in these cases ran along the top end joints, down the front end joints and the top front joint.”

William C. H. Wilson, a witness in rebuttal on behalf of the plaintiff, testified that he examined

these Federman cases in June, 1909, and that they were constructed with "some adhesive substance on either side of the felt" (page 53).

A. C. Larue Shaffer, who is substantially interested in the plaintiff company and in the result of this action, testified on behalf of plaintiff concerning these Cooper and Federman cases, saying "that he was present and heard Mr. Whitcomb testify in this case that he examined the Federman cases" and "whether felt was used in all the joints he does not know; that after Mr. Whitcomb's testimony he examined the Cooper Drug Company cases at Joplin, Missouri; that he found the Cooper cases were made at the joints with glue and felt; that in some of the Federman cases they had inserted a sort of bolt with a rubber washer on it down into the back frame; that the balance of the cases from the bottom to the front of the top corners and across the front on top and across the top of the ends, he thinks, was constructed with felt and glue * * * that the cement which they use in constructing the patented showcases and which the licensees are required to purchase from plaintiff is simply a composition of ingredients that they know about and which they have made up for them; that he does not claim any patent on the cement; that the patent covers uniting two plates of glass, with some adhesive substance and a cushion between" (pages 54 and 55).

Here we have the testimony as to the construction of these anticipating cases of Mr. Whitcomb, who made the cases and who went into detail as to his experimentation leading up to their construction, and testified minutely and repeatedly as to the construction and how it can be sincerely contended even from his testimony that these anticipating cases were not made in identical accordance with the claims of the patent is difficult to understand. But in addition Mr. Federman gives clear testimony as to the construction of the cases which Whitcomb made for him in April, 1900, and which he has used all these years. Then comes the plaintiff with five witnesses in rebuttal in a desperate attempt to distinguish between the patent and the anticipating cases and in its efforts to distinguish it signally fails and makes assurance doubly sure that the cases are identical so far as the patent covers a showcase.

If the plaintiff had omitted its so-called rebuttal testimony there might have been some slight excuse for its contending that the anticipating cases vary from the patent, but with this array of rebuttal testimony all possible excuse for its position completely vanishes. So far as that portion of the case where glass is joined with glass is concerned, and that is all the patent covers, the construction of the anticipating cases is exactly what the patent embraces. In brief, the joints were formed by inserting a strip of felt, the sides

of which were cemented to the glass. That applies with equal force to either the patent or the anticipating cases. The conviction is overwhelming and there can be no escape. The fact stands out as positive as a searchlight in the darkness. To deny it is a futile waste of energy.

The first claim of the patent so far as it covers actual physical means, and that is all a patent can cover, reads:

“A structure comprising a plurality of glass plates, the edges of which are spaced from the adjacent plates, a felt cushion filling the space between the adjoining plates, the plates being cemented to the felt.”

It appears that there are four elements in this construction, first, a plurality of glass plates; second, the edges of the plates are spaced from the adjacent plates; third, a felt cushion is inserted in the space between the adjoining plates and, fourth, the plates are cemented to the felt. We respectfully inquire wherein, in the slightest particular, the anticipating construction varies from this claim in any of its elements. That the anticipating cases embrace every detail of this claim cannot be gainsaid. If the witnesses had described the construction of the anticipating cases in the exact language of the claims it could not be clearer. As to the second claim we encounter exactly the same situation. When you analyze it

you have the identical thing you find in the first claim. The only difference is in phraseology. Where the first claim employs "felt" the second claim employs "elastic material," but as felt is an elastic material it follows necessarily and unavoidably that an anticipation of the first claim is equally an anticipation of the second claim. In the first claim we are told that the plates are "cemented" to the felt while in the second they are "attached." As cementing is attaching it again follows that an anticipation of the first claim must be an anticipation of the second. At this point we have only considered that portion of the claims which cover the actual physical means, omitting the resulting function that is appended to each claim. We will take up the functional portions of the claims later and show how they are invalid.

The plaintiff goes on at great length at various points in its brief telling the court what the patented structure consists of and how it is constructed. To determine what the patent covers resort, can be had to only one thing, and that is the claims of the patent. That is one point of law that is so absolutely fixed that there can be no question about it. The law gave the patentee an opportunity to put into words just what he claimed and imposed upon him the duty of doing so. He cannot now be heard to say that his claims mean anything different or in addition to their clear import. If it were otherwise the scope of

a patent would rise and fall with the needs of its holder. It would fluctuate in accord with the holders' interests, and be one thing today and something much different tomorrow. When he wanted to avoid anticipation his patent would be very narrow and when he wanted to enjoin infringement the patent would become very comprehensive. We desire to emphasize that *what* the plaintiff *says* its structure as patented is is wholly irrelevant. What it now says cannot be permitted to, in the least, change the situation. It must content itself with a reference to the claims of the patent. Anything else is a waste of printers' ink.

After telling the court what it now claims its patent is, it proceeds to take up the anticipating cases and at once lapses into inaccuracies.

In the third line of the division styled "Federman Cases," on page 12 of its brief, it says there was no felt on the back rail of the Federman cases. The testimony shows positively that there was and plaintiff's own witnesses so testify. For instance, on pages 53 and 54, plaintiff's witness, A. C. Shaffer, who has a substantial interest in plaintiff company, and is one of its officers, stated that he had examined the Federman cases and that "there was felt on the back rail of these Federman cases." Following this, plaintiff says the component parts of the adhesive substance are

unknown. That is equally true of the patented showcases. Plaintiff's witnesses state that their so-called cement is a formula that they have which is made up for them as they require it. However, that is wholly immaterial, as the patent does not cover cement by any stretch of imagination. If it did the formula would have to be disclosed, otherwise there never could be an infringement of the patent. Further than that, the patent does not require the use of cement or any particular adhesive substance. Then under the well-established rule that "that which infringes if later, anticipates if earlier," it follows that cementing the plates to the felt with any form of adhesive anticipates the claim. The plaintiff's contentions proceed on the theory that cement must be used and further than that, their particular brand of cement, in order to anticipate. This is clearly erroneous, as the claim does not use a noun or name the material with which the cementing must be done. The same observations are true as to the second claim. It requires that the plates be "attached to the elastic material" without in anywise specifying the means or material by which they shall be attached. Again he wanted to catch every possible infringer and by attempting to catch too much ahead he has actually caught too much behind. It seems to us that this should for all time dispose of plaintiff's attempted distinction between the patent and the anticipation arising out of the form of adhesive substance used. In one claim the plates must

be "cemented" and in the other "attached" to the felt, but by no manner of reasoning can it be successfully contended that the cementing or the attaching must be done with any particular material. The contention cannot endure even a careful reading of the claims.

Then on the same page plaintiff says Whitcomb testified the substance he used was "not cement." Unless the writer has overlooked something the plaintiff is again consistent by being wrong. What Whitcomb did say is that he did not use "ordinary cement." There is a great variety of cements and at best the term is a relative one. From plaintiff's viewpoint there is only one cement and they have it and won't tell anyone what it is. It, in some mysterious manner, has acquired a monopoly of the term cement, and what it pleases them to call cement is by reason of their pleasure actually cement while the calling of some material cement by some other party makes that material not cement. Whitcomb started in calling his adhesive cement some five years before the patentee employed that name for his adhesive, but, of course, when the patentee adopted the term cement he got the right-of-way and Whitcomb's rights immediately ceased. No doubt the cessation should be retroactive.

Again, on page 12 of its brief, plaintiff says the difference between the Federman cases and the

Joplin cases is that the latter cases had a strip of felt along the back rail. If this is the only difference then there is no difference, as in this respect, the cases are alike, as counsel will ascertain if they will only read the testimony. Then they say that the evidence is overwhelming that this construction made a tight right joint. Counsel for plaintiff must be very easily overwhelmed. We know they were in the trial below. Now, the evidence is not overwhelming that the anticipating cases had rigid joints. It does not even preponderate in plaintiff's favor. It should be kept in mind that of plaintiff's seven witnesses six of them are in somewise connected with the patent. Of these seven witnesses plaintiff succeeded in getting some of them to make indefinite expressions of opinion that the anticipating cases had solid joints, including the patentee, who never saw the Whitcomb cases. The patentee said "He had seen showcases where the top plates were bolted onto the woodwork, making a solid joint." This statement has no reference to the anticipating cases but to some cases he had seen. He never saw the anticipating cases. At best the solid joint, part of it, is a mere conclusion. Then the witness Price said the back part of the case "had bolts or screws fastened down tight." That is much short of solid and rigid. Plaintiff would have the court believe that there is absolutely no elasticity in the joints of the Cooper and Federman cases and that the four plates of glass in each case became

as one piece, the joints being just as solid and rigid as the glass itself, so that the vibration of a blow on one plate would have its entire force and energy communicated to the other plates; that in effect there is only one piece of glass in the Cooper and Federman cases. Let us see about this: Their Witness Holm said he repaired some of these Whitcomb cases, not either the Cooper or Federman cases, but some others, and that they had a hard solid joint. Then he immediately (page 47) proceeds to give himself the lie by saying that in repairing these cases he did not need to disturb the end plates of glass. In other words, he took the glass plates apart at the joints which positively refutes the idea that the joints were absolutely rigid and solid, as plaintiff contends. This is some of the evidence that overwhelmed plaintiff. Such a witness would overwhelm most anyone. Mr. Whitcomb should know something about this matter, and we will see what he says. On page 44 he states:

“He used felt in the joints of these all-glass cemented cases, for the vibration of the cases, that he made some without the felt, simply stuck one plate of glass on the other plate and found it was so solid any little jar would break it, then he thought of the felt to give the elastic movement and make an elastic joint; that the joints in the Federman cases and all those are not hard and fixed, they appear to be solid, but there must be some give to them or they would break; that his trouble with the first ones he made was that the joints were

solid and he could not handle them, they would break without anyone touching them, but later I got so I shipped them all set up, that the Fort Scott cases were set up in his factory and shipped down there all complete; that his idea was to get an elastic joint, something that would give a little, and he succeeded."

Further, on page 45, he said:

"That one of the objects in using felt in the joints between the glass was to give flexibility and elasticity to the joints and obtain sort of a rubber or cushion effect between the plates of glass."

This testimony from an absolutely disinterested witness is not only plausible but convincing. Plaintiff would have us believe that Mr. Whitcomb is a knave and a fool and does not know what he is talking about. We submit that he knows altogether too well what he is talking about for the welfare of this action. Right here let us note that a change in degree only does not permit a patent to stand. Even conceding, which we do not do, that the patent employs more elasticity than Whitcomb, the patent would then be invalid as patentees invention would only be a change in degree and only expanding an idea that was old. Facts always have more evidentiary force than opinions, so let us look to the facts as to these Federman and Cooper cases.

Mr. Federman is a druggist in Kansas City, Missouri, and on page 46 he testifies concerning

his cases, giving facts that point out clearly the truth of this rigid joint question. He says:

“That the strips of green felt are still there on the edges of the glass and can be seen readily; that the top plate has been broken on a couple of the cases and the fragments removed and new tops put on. * * * That whatever elasticity followed from the use of felt in the joints between the glass existed in his cases; that said cases were made by putting a strip of felt having an adhesive substance on either side of it in the joints between the glass and the different plates of glass, thus held together, and that any elasticity resulting from that method of construction existed in said cases.”

Counsel for plaintiff procured this witness to say that the joints were tight and solid, but when the matter was further called to his attention he gave the above testimony and said further:

“That in saying that the joints were solid he meant that they were not loose and open, but were firm with the felt intervening, with no opening to allow dust to enter, or anything of that kind.”

Mr. Federman is in no wise connected with this patent or controversy, and is absolutely without interest and his testimony should receive weight, especially as opposed to plaintiff's witnesses on the point, all of whom are interested in the outcome of this litigation. Some of plaintiff's witnesses are very materially interested.

Now, William E. Price, one of the plaintiff's witnesses, used the Joplin cases from their installation in 1899 until late in 1912, and he should be able to throw some light on the point. He says on page 52, in speaking of the ten Joplin cases:

"That the top plates of glass have been broken on eight of these cases and new tops put on; that two of the cases are still just as they were first set up and have not been changed or repaired, * * * that he has broken the top plates of these cases a good many times without breaking the other plates of glass, just the top plates would break and the other plates not break at all * * * that when the top plates of glass would get broken he would take a thin knife blade right under the glass * * * run the blade right along there through the felt and pull it off, it is not a very difficult process and some plates would skin right off."

How can the plaintiff escape these demonstrating facts from its own witness, and its only witness that is not in some manner interested? He says that he broke the top plates a "good many times" without breaking the other plates. If these joints were rigid and would not "permit any elasticity or resiliency," as plaintiff contends, how, we inquire, could he have a good many times broken the top plates without at all breaking the other plates of the case, which were adhered to the top plates so that they in effect became one piece? There is only one answer, the felt in the joint absorbed the shock which broke the top plate

and the shock was not communicated to the other plates. Then, in addition, the witness says he would, upon the top plates being broken, take a thin knife blade and run it right along through the felt in the joint and remove the plate, and that it was not a difficult process. Again, we inquire, could he have run his knife blade through the felt if the cement had permeated the felt and the joint had been solid and rigid, as plaintiff contends? With this uncontradicted evidence put in by plaintiff's witness, the fallacy and futility of plaintiff's contention becomes at once apparent. There is only one conclusion open, that is, that the joints in these Cooper cases were yielding and elastic as Whitcomb who made them said they were. Otherwise the plates could not have broken individually and the broken plates removed in the manner stated by plaintiff's witness. The idea of running a knife blade through a joint solid and non-elastic, such as plaintiff would like to have the court believe these joints were, is foolish. This is an instance where "Actions speak louder than words."

This should be abundant to entirely dispose of plaintiff's contention that the joints in the Federman and Cooper cases are rigid and without flexibility or elasticity. The facts are so clearly against the contention that plaintiff would not be urging the point if it had something better to offer.

Following its contention that the joints of the

anticipating cases are rigid and non-elastic the plaintiff on page 13 of its brief attempts to point out differences between the patent and the anticipating cases. It says Whitcomb did not use cement, but did use a semi-liquid compound, the ingredients of which are unknown; that it dried out in a short time and necessarily left a rigid joint. The all-sufficient answer to most of this is that there is no evidence to support it. It is not necessary that cement be used, as the claims of the patent do not call for it and whether the adhesive used is semi-liquid, or otherwise, is wholly immaterial. That the composition of the adhesive must, under the patent, be known, is idle. If the patentee had desired to use any particular cement or adhesive he should have so stated in his claim, and given the public the information so that it could know what belonged to it and what belonged to the patentee. Not having done so, he has only himself to blame. He simply said that the glass plates should be "cemented" or "attached" to the felt so that any material we choose may be used to do this cementing with. It may be too bad that the patentee did not make his claims otherwise, but it is too late now that controversy has arisen to permit him to adjust his claims to meet the varying needs and changing conditions as they arise. No doubt he would like to make his claims very broad when he is endeavoring to include infringers and very narrow when he encounters anticipation, but the law in its wis-

dom required him to make his claim once and for all time when he applied for his patent and to stand or fall by what he then voluntarily claimed. However, all this quibbling about the term cement is all beside the issue. Whitcomb had just as good right to call his mixture cement as the patent holder has to call its mixture cement. There is no particular virtue or magic about the word cement. Call either mixture any other name and it would still be the same thing and fulfill the same functions. For aught that appears in this record the two mixtures may be identical. There is nothing in the record that gives us any information concerning either mixture and probably for the reason that no one deemed it at all material. It is absolutely certain that it would not have to be proven that a claimed infringer used identically the same mixture as these patent owners use in order to make out a case of infringement. No doubt the showcases which defendant stipulated are an infringement of the patent, if it is valid, are made with a cement that is different from the plaintiff's cement. We could have raised that question and quibbled about it as plaintiff is doing, but fortunately we had something worth relying upon. However, the patentee is not confined to any particular cement and can change as many times as he chooses. It should be kept in mind that if the Cooper and Federman cases were made today and would constitute an in-

fringement of the patent, then their having been made and used more than two years prior to the application for the patent constitutes a clear case of anticipation.

Then plaintiff is endeavoring to impose another claimed difference on the court consisting of the fact, as it claims, that in the anticipating cases the top plate was bolted or screwed down to the top railing of the wooden frame, so that there could not possibly be any elasticity in that joint and the top plate so held by the screws is in an "absolutely rigid position." While the Cooper and Federman cases had screws through the glass at the top rear corners, down into the wooden frame the conclusion as to rigidity added by plaintiff does not follow. The glass was not screwed down to the wood, but rather lay upon felt and plaintiff's substantially interested witness on page 54 said that this screw had "a rubber washer on it." The witness Price, on page 51, said these screws were put in with a screwdriver "and they had big washers around the head; that he was not sure about the underside of the washers being lined with felt." So it appears that the construction at the back top joint was not absolutely rigid, as plaintiff would have us believe. There was felt on one side and either felt or rubber on the other side of the glass. The glass was in position between two cushions and, argue as they may, plaintiff's counsel cannot

change the facts and make it rigid. It would best suit the plaintiff to have these anticipating cases nailed up like a boxcar, but unfortunately for it, the facts are not as it would like. However, the back top joints where the top plate of glass is fastened on to the wood back frame is not within the claims of the patent, as the patent only covers the joining of glass to glass and is entirely silent as to joining glass with any other material. The plaintiff does not seem to urge this back top joint as a distinguishing feature very strongly in this court, while in the court below that was its main contention. The law, when we get to it, to the effect that the patent is confined strictly to the claims of the patent and that the patent holder cannot depart one iota therefrom will effectively dispose of this back top joint contention so far as it is urged in this court. The law is emphatic to the point that even the specifications and illustrations of the patent cannot be referred to for the purpose of expanding or adding to the claims of the patent.

Then plaintiff says the anticipating cases were so made that the plates *could not vibrate at all* and in the same sentence says the plates were not prevented from imparting their vibrations to the adjacent plates. These conclusions are not by any manner of means supported by the evidence, and the subject has been covered by what we have already said. We want to make the further obser-

vation that we cannot understand how a plate of glass so situated that it "cannot vibrate at all" can have any vibration to "impart" to its adjacent plates. The bulk of the plaintiff's presumed statements of fact is merely the conclusions of its counsel, and most of them are wholly unwarranted. The apparently big point that it is so industriously endeavoring to maintain is that the joints in the anticipating cases are right. That this is not the fact is so clear from the evidence that we do not feel that it requires more extended discussion.

On page 15 of its brief, plaintiff says its contention is that the anticipating structures had rigid joints between the plates, the plates not being prevented from imparting their vibrations to the other plates, and says that if the Joplin and Federman cases were made with elastic joints so the plates could vibrate and not impart the vibrations to the other plates, they would be substantially similar to the patent. We say the Joplin and Federman cases did have elastic joints and that they could vibrate, and without imparting their vibration to the other plates, and we feel absolutely sure that the evidence fully sustains us beyond the question of a doubt. There is an attempt in the record to avoid the positive proof, but it did not and could not get beyond a mere attempt. The plaintiff not being satisfied with the defense made out, put on five witnesses in rebuttal, and they clinched the matter for good and

all. They added fact upon fact and corroboration upon corroboration until the anticipation became so conclusive that try as it may there is no possible escape for plaintiff. We had no disposition to bring about the untimely demise of plaintiff's patent, but they forced the issue upon us and said we had no right and were invading their right. The futile contentions of plaintiff and the straws it is grasping for show the inherent weakness of its case. If we were endeavoring to anticipate by something long out of existence and had only memories to rely upon it would be a different situation. Here the cases are in existence and actually have been seen by practically all the witnesses. There is no disputing the existence of the cases and that they were made and put into use more than two years before the application for the patent. Likewise it cannot be seriously or successfully disputed that these anticipating cases are made in accordance with the claims of the patent. That the invention of the patent, if it has any, was practiced and used years before the patent is a fact that cannot be contradicted. Plaintiff's witness Price makes out a clear and positive case of prior use. His credibility is vouched for by plaintiff and what he says must be accepted. In the face of the volume of testimony as to prior use and prior invention that this record discloses it matters little what the applicable rule of evidence may be. The patent

involves a very simple structure. We are not dealing with some intricate complex mechanism that only the skilled and scientific can comprehend. One of the witnesses actually construed the cases, two of the witnesses have actually used the cases continuously for some twelve years, and other witnesses testifying on behalf of the plaintiff have actually seen the cases and examined the manner of their construction. The sum total of the evidence is so clear and positive that it is irresistible. That the cases are made in substantial accord with the claims of the patent is shown by the fact that plaintiff's witnesses, eager as they were, wholly failed to point out a distinction worthy of the name. When it was put right up to the witnesses to specify the differences the most they could do was to claim that a different form of adhesive was used; that they claimed the adhesive used by Whitcomb in the Cooper and Federman cases permeated the felt and that there was screws through the top plate of glass down into the back wood frame. This back top joint where the top plate of glass joins the back wood frame is clearly without the patent, so that any attempted distinction based upon this joint must fail. The adhesive used in the Cooper and Federman cases did not permeate the felt, as is demonstrated by the evidence. Whether the same adhesive was used is not known for the good and simple reason that no one knows what the plaintiff claims should be used. They are keeping the

thing secret, but have the audacity to claim that we have not shown anticipation because we did not use their secret formula. If such a procedure could obtain, there never could be an anticipation, as the patentee could keep a portion of his patent secret and thereby avoid the proof of anticipation. The fact is there is no patent on the adhesive substance and so far as the patent is concerned the world is open to use any adhesive it chooses.

In its so-called argument the plaintiff quotes from some of the witnesses in an unsuccessful attempt to show that the joints in the Cooper and Federman cases are rigid. We have already considered the testimony of these witnesses on the point, except H. W. Jackson, and he can be disposed of by saying that the cases he refers to are not the Cooper and Federman cases, and that the cases he talks about having repaired are the same cases the witness Holm said he took apart at the joints and repaired, showing conclusively that the joints were not rigid and solid and the plates adhered together as one piece even in these cases. Holm is an employe of Jackson's company, and was the party who actually repaired the cases referred to by Jackson.

Then it is said Whitcomb had no comprehension of an all glass case with elastic joints, and that he never tried to make one, did not know that it could be made, and did not appreciate the value

of them when they were made. The utter fallacy of this claim by plaintiff is shown by Whitcomb's testimony, on pages 44 and 45, where he tells of his experimenting and finding that constructing cases by adhering one glass to the other resulted in their breaking from even a slight jar, and that "they would break without anyone touching them." Further on he says "that his idea was to get an elastic joint, something that would give a little, and he succeeded." Counsel attempts to ridicule the witnesses in that he used the felt "for the vibration of the case," apparently contending that vibration of the plates is the desired thing. On page 45 the witness says:

"The objects of using felt in the joints between the glass was to give flexibility and elasticity to the *joints* and obtain sort of a rubber or cushion effect *between the plates of glass.*"

That should be definite enough, even to satisfy plaintiff.

The witness James P. Shaffer said, on page 50, that he tried to sell Whitcomb a license to make the patented cases and that Whitcomb objected to their construction, as it had "too much elasticity in the joints" and that Whitcomb seemed to "concede that you wanted some elasticity, but that we had too much, he thought we were overdoing the elasticity feature." From this evidence it is idle to contend that Whitcomb did not fully

comprehend and appreciate the elastic joint proposition. We do not claim he was as fanatical about it as the plaintiff.

Plaintiff says the testimony clearly shows that the plaintiff's case has gone quite extensively into public use and wherever it had become known and understood it has superseded all other cases and that the business is constantly increasing. We say the testimony shows nothing of the kind. The plaintiff's secretary said that the licensees are putting out about 500 lineal feet a month (page 38). That would be fifty ten-foot cases per month, or six hundred cases per year. If that is the popularity they refer to, all well and good, but we object to the extravagant language that is wholly unsupported. In closing its argument plaintiff says the plaintiff's case is made by the use of felt and cement in the joints. We deny that they are necessarily made with cement or with any particular form of adhesive mixture and further deny that plaintiff has any superior rights in the term cement. If only that is cement which it pleases plaintiff to call cement, then we will awake some morning to find that there is no such thing as cement, as plaintiff's pleasure is to that effect. Who ordained plaintiff to sit in judgment as to what is or is not cement? If it is going to be the judge we petition for the recall.

We believe we have shown beyond all possibility

of a doubt that showcases made in substantial, if not in identical, accordance with the claims of the patent, were made and used in this country more than two years prior to the application of the patent sued upon, and have disposed of plaintiff's contention to the contrary. If so, it follows as a matter of plain statute, that the patent is invalid, just as the lower court decreed.

PRIOR INVENTION.

We also contend that the patent is invalid by reason of prior invention. The testimony as to prior use covers this point except to show when the patentee first practiced the invention. His own statement is that he began experimenting on an all glass cemented showcase somewhere about 1904, and that he did not go into the showcase business until 1901 or 1902 (page 35). Again, on page 49, he says he went into the showcase business in March, 1902, and "began experimenting with the patented showcase along in 1904." From this it appears that for him to be "the original and first inventor or discoverer" (U. S. R. S. 4920) of the thing patented it must not have been made by anyone else prior to 1904. That Whitcomb made the invention and practiced it as early as 1899 cannot be successfully disputed. So we have a clear defense of prior invention. At the time the patentee made the discovery the idea of his patent and the right to vend and use the

same was public property which he had no right to monopolize. Some five years previously Whitcomb had invented the same thing, and as he did not procure a patent securing to himself any right of invention, it became the right of all. For any particular person to now claim the exclusive right to the invention is an attempt to appropriate public property to their own use. A patent is granted as a reward for inventing something *new* and *novel*, and useful. Weber did not invent anything *new* or *novel* and is not therefore entitled to the reward of a monopoly. In *Corrington vs. Westinghouse Air Brake Company*, 178 Fed., 711 (1910), in discussing the prior use testimony, the court said:

“Undoubtedly such use would defeat the patent, but so would proof that the patented combination was made by someone other than the patentee, two days or two hours before it was made by him, * * * such person must have invented the machine * * * which he seeks to have patented, and if it was shown that the machine was known and used by others in this country before his discovery, it is manifest that he is not the inventor within the meaning of the patent law.”

Again we want to call attention that the claims of the patent are confined to the joints where glass is joined to glass and do not cover the joints where the top plate of glass is joined to the back wood frame of the case. We respectfully submit that

the record shows a clear case of prior use as well as a clear case of prior invention.

THE LAW OF THE CASE.

Plaintiff takes up the law of the case by an abstract statement of what it would like the evidence to be. It starts out upon the theory that these anticipating cases have rigid joints, when as a matter of fact, as has been shown, they have elastic joints. We take no issue with much of the law plaintiff has so industriously presented, save to say that it has no application to the facts of this case. They insist that these plates of the Federman and Cooper cases cannot "vibrate at all," but that they "necessarily impart the respective vibrations" to the adjacent plates. This shows the inconsistency of plaintiff. The urgencies of their case are leading them round in a circle.

They persist in their reference to the screws in the top rear corners as making a rigid case. We reiterate that that portion of the case is entirely without the claims of the patent and further, that the screws do not and did not make a rigid joint. In fact, it would seem that more elasticity would be secured by letting the glass lie on felt than by adhering it to felt, as in the latter method some of the felt must be engaged by the adhesive, and to that extent the elasticity is reduced. It follows as a matter of common sense that you could not make a rigid joint with screws as was done in the

Federman and Cooper cases. The elasticity is in the felt and it matters not how you hold the glass in place against the felt. So long as the felt remains the elasticity follows necessarily. Whether the glass is adhered to the felt or held in place by pressure from the opposite side can make no possible difference. All we have to the effect that these screws make a rigid joint is the opinion of some of plaintiff's witnesses, and of course their opinions were in harmony with their interests in the case. Glass is a very fragile and brittle substance and will break from a light blow, even though suspended in space in contact with nothing. Elasticity seems to be the big thing plaintiff is contending about, and it is present in the Federman and Cooper cases.

To show the inconsistency of plaintiff, it may be observed that the patentee testifies that they construct the patent cases with the rear and bottom edge of the end plates and the bottom edge of the front plate set in putty in the frame of the case, which makes a far more rigid proposition than plaintiff is complaining about in the anticipating cases. The patentee surprisingly went so far as to admit that they get a pretty firm rigid joint on two edges of the end plates and on one edge of the front plate by the use of putty. Then he continues on page 49 by saying "that the elastic joint feature applies simply to the all-glass construction." He seems

to know what his patent actually covers better than plaintiff's counsel.

If this evidence by the patentee is correct, why do we hear so much about the rear top joint where wood and glass is joined.

Plaintiff makes much of the so-called rule that like means produce like results. It seems to feel that at last it has found the rule that has no exception. Be that as it may, we have no fault to find with the rule, as we contend that the anticipating cases have the identical results of the patent. The results are identical and the means are, to speak mildly, substantially the same. All the law developed by plaintiff along this line has no application to the case. As a matter of fact, the real question in the case is one of fact. If the court finds, as did the District Court, that the Federman and Cooper cases were made in substantial accordance with the claims of the patent, then the case falls by the very clear wording of the statute. We will not take the time to discuss the cases cited by plaintiff to the effect that novel ends and so on proves novel means. We contend that the patent employs no novel means and accomplishes no novel results, as the idea was old and in use several years before the patent. If we are right plaintiff's citations do not hit the case. It is aiming at a theory not based on the facts of the case.

Then plaintiff to some extent elaborates on the

point that inventive skill is indicated when the new article satisfies a long felt want, and so forth. That the immediate adoption and universal use of a patent device is some evidence that inventive skill is involved is conceded, but it is not by any means conclusive. As was said in *Butler vs. Bainbridge*, 29 Fed. 142, cited by plaintiff:

“Each case must depend upon its own facts and circumstances. The perplexities which surround such controversies cannot always be solved by an examination of adjudged cases. They serve to illustrate the paths to be traversed, but he who desires to select the right one must depend largely upon his own judgment.”

As the court well says, we get right back to the facts of each case.

Then in *Ansonia Brass & Copper Co. vs. Electric Supply Co.*, 144 U. S. 11; 36 L. Ed. 327, cited by plaintiff, the court holds: That a more thorough doing of that which had already been done by another involved no novelty; that the application of an old process to a new and analogous purpose does not involve invention, even if the new result had not before been contemplated; that a mere carrying forward or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the

same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent.

In *Lovell Mfg. Co. vs. Cary*, 147 U. S. 623, cited by plaintiff, the court says:

“That the extent to which a patented device has gone into use is an unsafe criterion, even of its actual utility; and while in a doubtful case, the fact that a patented article has gone into general use is evidence of its utility, it is not conclusive of that, much less of its patentable novelty. In this connection see *McClain vs. Ortmayer*, 141 U. S. 419 to the effect that advertising and large commissions often market a thing without merit.”

Then counsel cited *Cantrel vs. Wallick*, 117 U. S. 689 (29 L. Ed. 1017) to the effect that a patent is valid though not new in all its elements. In this case the court in quoting from *Machine Co. vs. Murphy*, 97 U. S. 120 (24 L. Ed. 925), said:

“In determining the question of infringement, the court or jury are not to judge about similarities or differences by the names of things; but are to look at the machines or these several devices or elements in the light of what they do or what office or function they perform; and to find that one thing is substantially the same as another if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different func-

tions or in a different way, or produce substantially a different result.”

Then, *Anderson vs. Collins*, cited by plaintiff, holds that the use of a different, but mechanically equivalent, method or material to construct some of the elements of a patented combination will not avoid infringement where the principle or mode of operation is adopted, and the elements, when completed, perform the functions by the same means as those described in the patent.

In *Stevenson vs. McFassell*, 90 Fed. 707, cited by plaintiff, the court said on the question of patentability:

“In a *doubtful case*, the fact that the patent device has gone into general use, and superseded other devices, *may* be sufficient to turn the scale.”

In *Buchanan vs. Perkins, Elec. Switch Mfg. Co.*, 135 Fed. 90, the court said:

“Whether in a given case, there has been an exercise of the inventive faculty within the meaning of the patent laws, is always a delicate and sometimes difficult question addressed to the sound judgment of the court having to pass thereon. It is difficult, perhaps impossible, to prescribe general rules for the exercise of this judicial function. It demands careful consideration of the prior art and the essential and distinguishing feature of the device or combination, as to which invention is alleged, and appreciation of the practical

working of the mental faculties. But it must often happen and is unavoidable, that what is evidence of inventive genius to one mind, may only suggest the exercise of mechanical skill to another equally sincere and intelligent."

This case strongly supports our contention that whether a patent involves invention is essentially a question of fact and each case must stand upon its circumstances. Some of the quotations by plaintiff in its brief show clearly that we are right. General usage; that others had striven for the same end and all those analogous elements are some evidence, in doubtful cases, that inventive faculty has been exercised, but after all is said and done each case must "paddle its own canoe."

Then the question that stands out prominently in the case is not lack of invention, but the question of prior invention and anticipation. It seems to us that the view the court must take as to prior invention and anticipation will make it unnecessary to go into the matter of patentability. Plaintiff's labored effort on the question of patentability may be to divert attention from matters which it regards as more serious.

As illustrating the inapplicability of some of the cases cited by plaintiff, reference may be made to the case of *Topliff vs. Topliff*, quoted on page 43 of its brief, as follows:

"It is not sufficient to constitute an anticipation that the device relied upon *might, by*

modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adopted nor actually used, for the performance of such function."

Such law in nowise affects this case. The anticipating thing here involved *was designed* by its maker and *was adopted and actually used* for the identical purpose claimed for the patent and no change or modification was necessary to make it accomplish that purpose. In other words, we contend that the anticipating cases were designed by Whitcomb and adopted for use and actually used identically as the patented structure and that plaintiff's efforts to show the contrary only served to make the identity of the anticipating and patented structures more certain and positive. Our position first last and all the time is that such cases as the Topliff case and others of its nature cited by plaintiff are not in point on the facts in this case.

We do not regard it as material what evidence rule applies to this case, as we have proven the anticipation beyond any doubt whatever, reasonable or otherwise. Plaintiff seems to emphasize its contention that we must show anticipation beyond a reasonable doubt, and even goes as far as to say that it must be shown to a moral certainty. That clear proof of anticipation is required is conceded, but that proof of the same degree as is

required in criminal cases is denied. Requiring proof beyond a reasonable doubt in a civil case runs counter to all the rules of evidence governing the adjudication of property rights. That a patent is a mere property right cannot be questioned. Yet, counsel would have us believe that the moment a patent is questioned it immediately becomes sacred, and is surrounded with all the safeguards and presumptions of life and liberty. We take the liberty, and even the life, of our citizens on evidence that is only beyond a reasonable doubt, and plaintiff would place chattels when they consist of a patent on the same basis. That such is not the law is obvious. The courts require clear **and** definite proof of anticipation and the expression of reasonable doubt appears in a few cases, but in each instance the showing was such as to call for condemnation. When it is claimed that a complex machine was anticipated many years ago and the thing is not in existence and only vague memories interested in the result are produced, then strong evidence is required. No such situation obtains here. The cases are actually in existence beyond a question, and plaintiff has only attempted to show that they differ, substantially, from the patent, and in this attempt it has lamentably failed. Then the thing here is not complex or even difficult, but is simple and can be understood by even a layman while anticipation is sufficient when it is such as to disclose the idea to one skilled in the art.

The language of Judge Sanborn in *Mast, Foos & Co. vs. Dempster Mfg. Co.*, 82 Fed. 327, illustrates the class of cases that give use to strong language as to evidence requirements. In this case he states:

“The evidence of prior use is the testimony of a *single witness* who was once in the employ of another infringer of the device of appellant, but has since been employed by the appellee. He produces no part of the old windmill which he testifies was set up and put into operation before Martin filed his application, and his evidence is without the support of any other witness.”

Of course, such testimony cannot prove prior use. It would not prove anything. Any law predicated on such an absence of proof as that, can have no bearing on this case.

Then the *Barbed Wire Patent Case*, 143 U. S. 275, was another instance where an attempt was made to dig something from memories and much conflict and confusion was developed. We simply have no such situation at bar and those cases do not control.

That prior use can be established by oral evidence alone and that the prior use of only one of the devices is sufficient to anticipate will appear from cases we will cite.

In *American Roll Paper Co. vs. Weston*, 59 Fed. 147, it appeared that five or six witnesses gave more or less definite testimony as to the prior use of a single roll and paper cutting machine used in a store years before. The thing was no longer in existence, and the only testimony as to its use and construction was recollections, and the court held it sufficient proof of prior use. The proof there was far weaker than in the case at bar. There only one of the anticipating devices had ever been in existence and it had been lost a long time before the trial.

Then the law does not require the use to be other than what the thing is designed for. The use of some watch mechanism in one watch as it was designed to be used is as much a public use within the law as if it were something used on a busy street corner. A good case on this point is *Egbert vs. Lippman*, 104 U. S. 333; 26 L. Ed. 755, in which prior use of corset stays was involved.

Now we propose to show the court that facts are proven in a patent case, including the defense of prior use, as they are in other cases. When the matter attempted to be proven is very doubtful and improbable more proof is required than when the claimed fact is probable. You have to have clear evidence of an improbability in any case. More proof is required to show that a man procured goods by fraud than that he purchased them in the

ordinary way as the probabilities are materially different. If it is claimed that one previously used a complicated piece of electrical mechanism more proof is required than when he claims to have previously used a simple thing like a bookcase or showcase. The reason is obvious. Then whether the witnesses have knowledge of the business about which they testify is a factor in determining the value of their testimony. Again, the probability enters. Whether the thing testified about is actually in existence or merely exists in the memory of a few individuals is a very material factor in weighing evidence. It requires more proof to show where a cornerstone *was* years ago than where one *is* today. The everyday probabilities enter into a patent case the same as any other case, and the mind of the court must be satisfied in a patent case the same as in any other case. If a patent is claimed to be invalid because of the prior issuance of a patent covering the same thing it can be seen how the claim might excite suspicion as the patent office, to a certain extent, determines those matters and it is not supposed to issue duplicate patents to different persons. But when a patent is claimed to be invalid by reason of facts entirely extraneous to any determination by the patent office, and which that office could not have been conversant with, we see no reason for great alarm or suspicion. If the claimed facts are true, the patent office's grant was invalid. The right

was beyond its authority to dispose of. True, even then the patent is *prima facie* valid, but nothing more. The same is true of any official grant that is due and regular on its face, but if it is issued without authority it is invalid and can be so determined by the courts, and upon evidence that is clear and satisfying and no "beyond a reasonable doubt" evidence is imperative. Why there should be any greater temptation to attack a patent on facts not appearing on its face, but which operate to defeat it than there is to attack any other document in the same manner, is not easy to appreciate. Of course, the instances of such attacks are more numerous because patents are more frequently before the courts. A patent is either valid or invalid and when a defendant, clearly within his legal rights contends it is invalid by reason of facts existing at and before its issue, we see no reason why his defense should be covered with suspicion. He has been brought into court by the patent holder and when he is doing only what the law expressly accords him the right to do, he should not be characterized as one resorting to suspicious methods.

Now, let us see what the courts have said. In *Coffin vs. Ogden*, 18 Wall. 120, 21 L. Ed. 821, the Court, in discussing the prior knowledge and use testimony, said:

The law requires not conjecture, but cer-

tainty. * * * The prior knowledge and use by one person is sufficient."

In that case Erbe testified to having made the anticipating lock before the patentee. One Brossi testified to having seen the lock at Erbe's house, where Erbe explained it to him and that he saw it in use on a door at the shop where Erbe worked. Masta testified that Erbe showed him the lock and that he examined it and he testified as to its construction. One Patterson said Erbe showed him the lock and he described it and said it was the same as the patent product. He was supposed to have used one of the anticipating locks but was not sure. Erbe thought one of the locks was used at the shop. Only one witness gave positive testimony as to the use of the anticipating lock. After reviewing this evidence, the court said:

"Here it is abundantly proved that the lock originally made by Erbe was complete and capable of working. The priority of Erbe's invention is clearly shown. It was known at the time to at least five persons, including Jones and probably to many others in the shop where Erbe worked; and the lock was put in use, being applied to a door as proved by Brossi. It was thus tested and shown to be successful. These facts bring the case made by appellees within the severest tests which can be applied to them. The defense relied upon is fully made out."

In that case, only one lock was previously used and the fact of its use depended upon the evidence

of one witness and the anticipating thing was much more difficult and complex than the matter at issue here, and here the evidence is much more abundant than in that case.

In *Lee v. Upson & Hart Co.*, 43 Fed. 670, the plaintiff was contending for a rehearing on the ground of the insufficiency of the prior use testimony. The court said:

“If the improvement had been a complex mechanism, if the essence of the invention had been the nice adjustment of parts to produce a result, or if the thing to be done required genius of a superior order, the testimony would have been insufficient; but it requires much less testimony to satisfy a court that the Messrs. Hart, who had brazed and welded, and butt-welded for years, conceived and carried out the idea of butt-welding instead of brazing the inclined end lips of a blank, than it would to satisfy a court that they had made a new, complicated machine. In such a case as this, the *sever scrutiny* which is given to the alleged anticipation of the Morse telegraph, the Bell Telephone, or the Howe Sewing Machine, is not called for, because reasonable doubts do not exist. The argument of the plaintiff forgets that it requires less testimony to establish a fact which was very likely to have occurred than to establish an improbable theory. The application is denied.”

Another case to the same effect is *Clark v. Palmer Bldg. Block Co.*, 149 Fed. 1001. As to the prior use testimony the court said:

“Bearing in mind the familiar rule, we find no basis for the slightest doubt of the testimony concerning prior use. The witnesses said that the structures were in existence as erected, at the time they were testifying. Owners, architects, workmen, averred that the structures were put up many years prior to the application for the patent. Appellee offered no evidence in contradiction and was and is content to invoke the rule of reasonable doubt. These structures speak for themselves as to the question of design. Their nature and location were such that no pretense can be made that they were erected for the purpose of this case. *The Barbed Wire Patent*, 143 U. S. 275; *Bettendorf Patents Co. v. Little Metal Wheel Co.*, 123 Fed. 433, and other cases in which the thing can only be known as it is reconstructed, years afterwards, from the memory of witnesses, have no pertinency.”

In *Corrington vs. Westinghouse Co.*, 178 Fed. 711, the court in discussing the reasonable doubt rule, said:

“But testimony must be weighed in a patent cause as in other causes and the court is not permitted to reject arbitrarily the testimony of respectable witnesses because of mistakes and differences in non-essentials.”

In *Riley v. Daniels*, 20 Fed. Cases No. 11837, the court held that the testimony of one witness, that in January, 1862, he formed a lamp wick the same as the one patented was sufficient to overcome the *prima facie* evidence furnished by the patent. The court said:

“The important question upon this state of facts is whether inasmuch as the defendant takes the burden of proof and must overcome by preponderating testimony the *prima facie* evidence which is furnished by the letters patent, the testimony of a single witness is sufficient to create such a preponderance. In cases in which the priority of the invention of a machine was the subject of controversy, I should not be willing to rely upon the testimony of a single witness that he had made such a structure, and had antedated the patent, unsupported by the presence of the machine itself. The bare recollections of one witness in regard to the peculiar construction of a piece of machinery, especially if the structure is one of a complex character, is not ordinarily sufficient evidence of a patent. But in this case, the invention of the patentee was of the simplest character. * * * Much less testimony should be demanded to satisfy a court that a very simple invention had been anticipated than would be necessary to prove the fact that previously to the alleged date of an invention, originally requiring much labor, skill and ingenuity, another person had made and completed the same machine or article. The evidence should be of such a character as to satisfy the court that the prior invention of the particular article in controversy took place.”

In *National Casket Co. v. Stolts*, 157 Fed. 392, the court held that the prior use was established by one witness and without the production of the prior used device. The court said:

“We are now dealing with a witness concededly familiar with the art, who narrates

acts of his own, so simple in character that he can hardly be mistaken regarding them. A carpenter's description of a compound wound dynamo seen by him ten years before might well be received with grains of allowance, but if the question were whether a bookcase built by him at that time was provided with glass door or curtains, this statement would probably be received without cavil. So it would seem that an undertaker who swears that he tacked silk illusion in a casket as a face plate, cannot be laboring under misapprehension. Either the face plate was attached as he testified, or he is guilty of a deliberate falsehood. As before stated, we regard the latter supposition as an impossible alternative."

In *Moyer v. Metal Co.*, 169 Fed. 825, the court held the prior use established and said:

"But in the present case the witnesses were acquainted with devices of the description in suit."

Then in *Rochester Coach Lace Co. v. Shaefer*, 46 Fed. 190, the court said:

"But, irrespective of these views, unless the court is to reject arbitrarily the evidence of several uncontradicted witnesses, the method described in the first claim was employed in at least two instances prior to the patent and in one instance as early as 1859. No reason is perceived why the court should not credit these witnesses. If we were dealing with a complicated machine or an abstruse and difficult process there would be reason to say that persons unskilled in the art might easily be mistaken in describing minute details. But

here, we have to do with the simplest possible contrivance * * * A person of average intelligence who had actually made balls of yarn by this method could hardly be mistaken about the use of the spool. No motive for perjury is suggested and no discrepancies which discredit the testimony upon the principal points are pointed out."

In *Phoenix Knitting Works v. Rich*, 194 Fed. 721, we find the court stating as follows:

"Applying to the proper consideration of the testimony of the four witnesses on this point whom Judge Witmer considered, that of Miller and his wife not in the Philadelphia record, we are compelled to find that, in the early part of 1906, Miller made and sold to Myers a quantity of mufflers which are plainly within claim one of the Mead patent and clear anticipations thereof. * * * unless we arbitrarily reject them as credible witnesses which we cannot do. Undoubtedly the court must scrutinize the testimony offered to establish a prior use, and the rule should be observed that in such testimony the evidence must appear superior to a mere preponderance and must prove the priority strictly; but there is no hard and fast rule which would exclude such testimony as that touching the Myers muffler."

In the case the court quoted from *Sipp v. Atwood*, 142 Fed. 149, where it was said the subject matter is: "so simple in character that it is impossible to believe that an ordinary intelligent man could be mistaken" as to its exact form and function. It also quote from *Lee v. Hart*, 43

Fed. 670, to the effect that if it had been a complex machine the testimony would have been insufficient.

Brush v. Condit, 132 U. S. 39, 33 L. Ed. 251, is a good case on this point. There the court said:

“The plaintiffs vigorously insist that the Hayes clamp was not a completed and successful invention, but that its use was ‘merely tentative and experimental, and was permanently abandoned because the device did not promise to be successful’ and ‘the plaintiff press the question * * *.’ Why, then, was the future use of the Hayes clamp and lamp discontinued?”

In deciding the case the court said:

“Although only one clamp and one lamp were ever made, which were used together two and a half months only, and the invention was then taken from the lamp and was not afterwards used with carbon pencils, it was anticipation of the patented device, under the established rules upon the subject. With a strong disinclination to permit the remains of old experiments to destroy the pecuniary value of a patent for a useful and successful invention, and remembering that the defendants must assume a weighty burden of proof, I am of the opinion that the patentee’s invention has been clearly proved to have been anticipated by that of Hayes.”

Egbert v. Lippmann, 104 U. S. 333, 26 L. Ed. 755, is another good case on this point, in which the court said:

“The evidence on which defendants rely to establish a prior public use of the invention, consists mainly of the testimony of the complainant herself, who is the executrix of the original patentee.”

The testimony consisted of Egbert, who said that Barnes gave her a pair of the corset steels in 1855; that in 1858 he presented her with another pair; that Barnes made both pairs; that she wore the steels in several pairs of corsets. One Sturgis says that in 1863, Barnes took him to his home to see the steels and Egbert (then Mrs. Barnes) produced the corsets and took out the steels and Barnes explained how they were made. The court said:

“This is the evidence presented by the record, on which defendants rely to establish the public use of the invention. * * * We observe in the first place that to constitute the public use of a patent it is not necessary that more than one of the patented articles should be publicly used. The use of a great number may tend to strengthen the proof of public use, but one well defined case of public use is just as effectual to annul the patent as many. We remark, secondly, that whether the use of an invention is public or private, does not necessarily depend upon the number of persons to whom its use is known.”

The court held that the prior use was established.

In *Morgan v. Daniels*, 153 U. S. 120-123, 38 L.

Ed. 657, the court said in discussing the evidence rule in prior use testimony:

“The plaintiff in this case, like the defendant in those cases is challenging the priority awarded by the patent office, and should, we think, be held to strict proof. In the opinion of the court below the rule is stated in these words: ‘the complainant on the issue here tendered, assumes the burden of proof, and must, I think, as the evidence stands, maintain a clear and undoubted preponderance of proof that he is the sole author of that drawing.’”

In *National Cash Register Co. v. American Cash Register Co.*, 178 Fed. 79, the Circuit Court of Appeals, in referring to the prior use testimony, said:

“The fact that there was only a single sale of a single machine does not save the patent. One sale before the two years’ period will invalidate a patent as well as many, citing *Smith and Griggs Mfg. Co. v. Sprague*, 123 U. S. 249, 257, 31 L. Ed. 141.”

In *Delameter v. Heath*, 58 Fed. 414, the court said:

“The opinions of the Supreme Court in * * * abundantly sustain the proposition that proof of a single unrestricted sale is sufficient to establish the defense of prior public use.”

In the case of *Doubleday v. Beatty*, 11 Fed. 729,

it was held that oral evidence alone may be sufficient to prove prior use.

In *Daniel v. Restein Co.*, 131 Fed. 469, the court said:

“How any two devices could be closer, it is difficult to see, and that the one fulfills the terms of the patent equally with the other, there can be no doubt. It is contended, however, that the two packings are distinguished by the results, * * * the difference so established is one of degree, and not of mechanical structure, which alone is patentable. But it is said that the earlier packing was not successful commercially * * * and that it never advanced beyond the experimental stage. Prior knowledge and use by a single person has been held to be sufficient to negative novelty * * * and there is far more than that here. It was not necessary that it should go into general use or become a commercial factor, as suggested, and that it did not may well be ascribed * * * to the fact that it was not a cheap packing, and was not ‘pushed’.”

The last case is right in point in view of plaintiff's contention in regard to the results of the anticipating cases. If there is any difference in the amount of the elasticity it is only a question of degree. As a matter of fact, there is nothing to show how much elasticity follows from the patented construction. By using very thick felt they may get a great deal of elasticity while if they use real thin felt the elasticity might be reduced to a

minimum. Then the grade and texture of the felt might be a factor in determining the amount of elasticity obtained.

In *Bradley v. Eccles*, 138 Fed. 911, the court said:

“It is, of course, well settled that, under Sec. 4886, R. S. U. S., when a device has been in public use and on sale in the United States for more than two years prior to the filing of the application on which a patent has been granted, the patent will be void.” Citing several cases, the court also said:

“One well defined case of prior public use in the United States is all sufficient.” Citing several cases.

In *Parker v. Stebler*, 177 Fed. 210, the Circuit Court of Appeals held that where *oral testimony only* is relied upon to establish prior use it must be clear and satisfactory so as to convince the court beyond a reasonable doubt.

In the case of *Swain v. Holyoke*, 102 Fed. 910, it was shown that there was one instance of prior use about a week in excess of the two-year period and it was contended with some basis in the testimony that the prior use was experimental and the court went so far as to say that the purpose of the use was a “desire to introduce his invention and make it known to the public” and to know “how his invention would work, with a view to

improving the same.” In deciding the case the court said:

“U. S. R. S. 4886 authorizes the patenting of a machine ‘not in public use, or on sale for more than two years prior to his (patentees’) application.’ A certain kind of experimental use is held to be without the language just quoted, but it seems to me that the sale of Chaffee and the use at Moodus were within the statutory exception.” (Citing several cases.)

This case was decided by the Circuit Court of Appeals and is reported in 109 Fed. 154, where that court held that a single sale for actual use more than two years prior to the application for a patent constitutes prior use within U. S. R. S. 4886 which will invalidate the patent, unless it is clearly shown that the principal purpose of the sale was experimental, with a view of testing and perfecting the invention. That court said the fundamental inquiry is:

“Under what circumstances and for what purpose did the public use or sale take place? And, where it appears that there has been a public use or sale more than two years before the application, the burden is thrown upon the patentee to establish, by full, clear and convincing proofs, that such use or sale was principally and primarily for experimental purposes, and that such purposes were not merely incidental or subsidiary.”

This case is not only in point to show that a

single sale or use is sufficient to invalidate the patent, but also to the effect that to defeat such prior use or sale the patentee has the burden of proof and must show the defeating facts by evidence that is "full, clear and convincing." In view of such law as this, it is easy to see how little basis there is in the case at bar for the plaintiff to contend that the sale by Whitcomb and the use by the other parties was experimental.

Lettelier v. Mann, 91 Fed. 917, is another case holding that the facts defeating prior use must be shown by the plaintiff. There the court said:

"The character and degree of evidence necessary to prevent a prior use from invalidating a patent have been stated by the Supreme Court of the United States, as follows," quoting from *Smith & Griggs Mfg. Co. vs. Sprague*, that such testimony should be "full, unequivocal and convincing."

In *Eames v. Andrews*, 122 U. S. 40, 30 L. Ed. 1064, the court held that the prior knowledge and use must be sufficient only to enable one skilled in the art to practice the invention.

Other cases holding that a sale more than two years prior to the application for the patent operates to defeat the patent, are:

Fruit Jar Co. v. Wright, 94 U. S. 92; 24 L. Ed. 68.

Hall v. McNeale, 107 U. S. 20; 27 L. Ed. 367.

Manning v. Glue Co., 108 U. S. 462; 27 L. Ed. 793.

The plaintiff is contending that Whitcomb has forgotten and abandoned the invention made by him in 1899. There is absolutely no basis for this in the facts, but in any event the burden of making any such showing is on the plaintiff.

Dalby v. Lynes, 64 Fed. 376.

Then the contention is advanced that Whitcomb did not appreciate the value of his invention. This again has no foundation in fact. In the case of *Merimac Mattress Co. v. Feldman*, 133 Fed. 64, the court said:

“Anticipation is not avoided by the fact that the inventor of the anticipatory device did not realize its value, which he reduced to practice.”

That is the important point, was it reduced to practice, so that one skilled in the art could practice the invention? There can be only one answer in the case at bar.

Another contention is that Whitcomb's invention was an accident. This, too, finds no supporting evidence but as a matter of law it makes no difference whether it was accidental or otherwise.

In *National Harrow Co. v. Quick* 74 Fed. 236, the court said:

“To constitute anticipation of a later patent it is enough that such a construction had been in well established use, whether it originated in design or by accident.”

Again we get back to the question—was the thing in actual use in the manner it was designed to be used and so those skilled in the art had an opportunity of learning the invention? If so, the matter of accident, abandonment, experiment and appreciation or lack of it are all foreign to the inquiry.

A good case on the question of experiment is *Mfg. Co. v. Sprague*, 123 U. S. 249, 31 L. Ed. 141, where the court holds that where the substantial use is not for experiment, but is mainly for the purpose of trade and profit and the experiment is incidental and such use is public and for more than two years prior to the application, it will defeat the right to a patent. This case also holds that where the defense of prior use is met by the claim that the use was for an experiment “the proof on the part of the patetnee * * * should be full, unequivocal and convincing.”

Now, it seems perfectly clear from the foregoing authorities that there is no hard and fast rule of evidence as to prior use testimony in patent cases.

A patent case is not unlike any other case. The court must be satisfied that the prior use actually took place. Some of the courts have used the reasonable doubt expression, but in cases where the showing was very flimsy. For the most part, such expressions have been references to other cases and almost wholly in cases where the prior used thing was not in existence and oral testimony alone was relied upon to show its construction. It has been held so clearly and positively that one instance of prior use is sufficient to defeat a patent that it almost seems idle to discuss the question. Then, there is a very clear distinction running through the cases to the effect that much more proof of the prior use of a complex machine is required than is required to establish prior use of a comparatively simple device. This case clearly comes within this exception to the rule if it can be said there is such a rule. There is another exception to the rule that much less proof is required when the prior used thing is shown to actually exist than when the court must rely upon memories alone. This exception innures to the benefit of the defendant in the case at bar. Another exception also applicable to this case is that less testimony is required from those familiar with the art than from strangers thereto. When the whole situation is analyzed we find aside from what the rule contended for by plaintiff really is, that in any event it has no application to the instant case. On the other hand, we find that plain-

tiff is required to make very full and convincing proof of any facts claimed to defeat the prior use testimony. In *Sipp Co. vs. Atwood-Morrison Co.*, 142 Fed. 149, the court said:

“We see no reason to doubt the testimony as to these alleged prior uses. The witnesses are shown to be men of experience and intelligence and there is no impeachment of their character. Their familiarity with the art and industry to which the patent in suit relates, is abundantly established. No bias or pecuniary interest is shown to qualify the force of their testimony. The time that has elapsed since the date of the facts testified to was not great,—ten or twelve years. The witnesses were in the prime of life, and their testimony direct, positive and distinct as to the facts testified to.”

In any event, this reasonable doubt rule, so far as it applies at all, only applies to the defense of prior use leaving the defense of prior invention free from any such burden though, of course, the burden of proving prior invention is on the defendant, but only in the ordinary degree of weight.

As throwing light on the question of prior use in this case it might be well to consider briefly the rule that “*that which infringes, if later, anticipates if earlier.*” This rule is laid down in *Miller vs. Eagle Mfg. Co.*, 151 U. S. 186, 39 L. Ed. 121, where the court said:

“It admits of little or no question that if this Brown patent was one of later date than

the Wright patent of 1881, it would be held to be an infringement thereof, as under the authorities, 'that which infringes, if later, anticipates, if earlier.' *Peters v. Acme Mfg. Co.*, 129 U. S. 530, 32 L. Ed. 738; *Thatcher Heating Co. v. Brutis*, 121 U. S. 286, 295, 30 L. Ed. 942, and 946; *Grant v. Walter*, 148 U. S. 547, 37 L. Ed. 552; *Gordon v. Wardner*, 150 U. S. 47, 37 L. Ed. 992; *Knapp v. Morris*, 150 U. S. 221, 37 L. Ed. 1059.

This rule is so well established that it cannot be evaded. Suppose some one was now making cases identically like the Cooper and Federman cases with all the all-glass joints made precisely in accordance with the patent the back top joint, we will assume, being held down to the felt with screws instead of cement. Can it be doubted for a moment that such construction would be an infringement of the patent? Then counsel would be contending that screwing glass down to felt made an elastic joint and that in any event infringement could not be avoided by only using ninety per cent of the idea of the patent. They would say, and rightly so, that to use part of the principle was as bad as using the whole; that to employ the principle of the patent only half so far as the patent must be an infringement as otherwise infringement could be avoided by stopping the felt cement construction only a few inches short of the sum total of the patent. It is the principle and idea in concrete form that is patented and not the extent of its application. Yet,

the law says with clearness and positiveness that "whatever infringes, if later, anticipates if earlier." If the Cooper cases, for instance, would infringe if made now, they are bound to anticipate as having been made in 1899. The use in any degree of the idea of a patent covering an art or process such as the patent sued upon, would, it would seem, constitute an infringement. If ten per cent can be used without infringing, then ninety-nine per cent can also be used without infringing. It follows that any substantial use of the idea of a patent covering a process of construction must be an infringement thereof it in turn follows under the law that any substantial prior use of the idea constitutes anticipation. In using the term idea it must be understood as having been carried into concrete form. A mere naked idea is not patentable.

CONSTRUCTION OF THE PATENT.

Section 4888 of the U. S. R. S. requires among other things that an inventor applying for a patent "Shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery."

Now, as to the construction of the patent in suit, the defendant contends that plaintiff is confined strictly to what is stated in the claims; that a portion of the claims attempt to cover a function or result; that a function is not patentable and that

so far as the claims are functional they must be restricted and held invalid; that a patent can only cover the concrete, physical means employed to accomplish the result or function; that the claims of a patent being self-imposed are binding on the patentee and all that he does not claim is abandoned to the public; that the claims of a patent cannot be enlarged or extended in any particular even by reference to the specifications, descriptions or illustrations of the patent; that a patentee is confined to his claims even though his invention is clearly broader and more inclusive; that the patent in this case covers only the all-glass joints of the showcase and in no way includes the back top joint of the showcase, or the character of adhesive substance to be used.

Now claim one of the patent reads:

“A structure comprising a plurality of glass plates, the edges of which are spaced from the adjacent plates, a felt cushion filling the space between the adjoining plates, the plates being cemented to the felt (each plate being adapted to freely vibrate in its natural plane of vibration, and prevented by the felt cushion from imparting its vibration to the adjacent plate).”

The brackets are used to indicate that portion of the claim that we shall later contend is functional and invalid for that reason. The second and only other claim of the patent is just like the first with a little change in phraseology and that “an

elastic material” is substituted for “felt cushion” in claim one.

Now, if patent claims are strictly construed and are limiting and confining in their character and cannot be in any wise extended or enlarged by construction or even by reference to the specifications or drawings it is easy to see how these claims only cover the construction where there is a “plurality of glass plates” and that they do not in any possible sense embrace the back top joint where plaintiff is attempting to distinguish the patent from the anticipating cases. Of course, a distinction cannot be based on a feature not within the patent. If the feature is not there neither is the distinction.

Now, what is the law on this subject?

In *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344, in construing the claims of a patent said:

“When the terms of a claim in a patent are clear and distinct, as they always should be, the patentee in a suit brought upon the patent, is bound by it. He can claim nothing beyond it. But the defendant may at all times, under proper pleadings, resort to prior use and the general history of the art to assail the validity of a patent or to restrain its construction. The door is then opened to the plaintiff to resort to the same kind of evidence in rebuttal; but he can never go beyond

his claims. As patents are procured *ex parte*, the public is not bound by them, but the patentees are and the latter cannot show that their invention is broader than the terms of their claims; or, if broader they must be held to have surrendered the surplus to the public."

Lehigh R. R. Co. v. Mellon, 104 U. S. 112, 26 L. Ed. 639, where the court was construing the claims of a patent said:

"In view, therefore, of the statute, the practice of the patent office and the decisions of this court, we think that the scope of letters patent should be limited to the invention covered by the claim and that though the claim may be illustrated, it cannot be enlarged by the language used in other parts of the specifications. * * * In this case the description of the appellee's invention is much broader than his claim. * * * He can not go beyond what he has claimed and insist that his patent covers something not claimed, merely because it is to be found in the descriptive part of the specifications."

Then in *Yale Lock Co. v. Greenleaf*, 117 U. S. 554, 29 L. Ed. 952, the court said:

"We think this difference between the two locks does not give validity to the Rosner patent, for two reasons: First, because of the shape and size of the key hole is not mentioned in the claim of the Rosner patent as one of the elements of the combination. The scope of letters patent must be limited to the invention covered by the claim, and while the claim may be illustrated it cannot be enlarged by language used in other parts of the speci-

fication. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 247; *Railroad Company vs. Mellon*, 104 U. S. 112.”

Again in *White v. Dunbar*, 119 U. S. 47, 30 L. Ed. 303, the court, in construing a patent, said:

“Some persons seem to suppose that a claim in a patent is like a nose of wax, which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from, what its words express. The context may undoubtedly be resorted to, and often it is resorted to, for the purpose of better understanding the meaning of the claim; but not for the purpose of changing it and making it different from what it is. The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the clear import of its terms. This has been so often expressed in the opinions of this court that it is unnecessary to pursue the subject further.”

In *Howe Machine Co. vs. National Needle Co.*, 134 U. S. 388, 33 L. Ed. 963, the court said:

“The specification and drawings are usually looked at only for the purpose of better understanding the meaning of the claim, and certainly not for the purpose of changing it and making it different from what it is. As remarked by Mr. Justice Bradley, in *White v. Dunbar*, 119 U. S. 47, ‘the claim is a statutory requirement, prescribed for the very pur-

pose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms.”

In *McClellan v. Ortmyer*, 141 U. S. 419, 35 L. Ed. 800, we find the court stating as follows:

“While the patentee may have been unfortunate in the language he has chosen to express his actual invention, and may have been entitled to a broader claim, we are not at liberty, without running counter to the entire current of authority in this court to construe such claims to include more than their language fairly imports. Nothing is better settled in the law of patents than that the patentee may claim the whole or only a part of his invention and that if he only described and claims a part he is presumed to have abandoned the residue to the public. The object of the patent law in requiring the patentee to ‘particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery’ is not only to secure to him all to which he is entitled but to apprise the public of what is still open to them. The claim is the measure of his right to relief, and while the specification may be referred to to limit the claim, it can never be made available to expand it.”

The, in *Deering v. Harvester Works*, 155 U. S. 296, 39 L. Ed. 157, the court said:

“It is possible that Olin was entitled to a broader claim than that to which he limited himself, but if he described and claimed only

a part of his invention, he is presumed to have abandoned the residue to the public."

In *Western Electric Mfg. Co. v. Ansonia Brass Co.*, 114 U. S. 453, 29 L. Ed. 210, the court, in determining the scope of a patent, said:

"That part of the alleged invention is not even referred to in the most distant manner in the claim. It has been held by the court that the scope of letters patent should be limited to the invention covered by the claim; and, though the claim may be illustrated, it cannot be enlarged by the language and other parts of the specification. *Railroad Co. v. Mellon*, 104 U. S. 112. The element of the process under consideration cannot, therefore, be held to be covered by the patent. The contention that the patentee intended to include it in his process is evidently an afterthought."

In *Coupe v. Royer*, 155 U. S. 565, 39 L. Ed. 263, the court used this language:

"The principle of construction which we think applicable to the plaintiff's patent is that such construction must be in conformity with the self-imposed limitations which are contained in the claim. Such claims are the measure of their right to relief."

In *U. S. Co. v. Asphalt Co.*, 193 U. S. 591, 40 L. Ed. 342, the court said:

"It is not within the rightful power of the courts to enlarge or restrict the scope of patents which by mistake were issued in terms too narrow, or too broad to cover the inven-

tion, however manifest, the fact and extent of the mistake may be shown to have been."

In *Unhairing Co. v. American Co.*, 198 U. S. 399, 49 L. Ed. 1100, the court said:

"In making his claim the inventor is at liberty to choose his own form of expression, and while the courts may construe the same in view of the specifications and the state of art, they may not add to or detract from the claim."

In *Universal Brush Co. v. Sown*, 154 Fed. 655, the court held that a patent cannot be given a construction broader than its terms in order to cover something which might have been claimed, but was not.

In *Peifer v. Brown*, 106 Fed. 938, the court said:

"If it be true, as suggested by the plaintiff's expert witness, Mr. Clark, that the patent granted to Mr. Peifer, and accepted by him did not adequately cover his real invention, it is a misfortune which the court is powerless to redress."

In *Schreiber & Couchner Mfg. Co. v. Adams Co.*, 117 Fed. 830, the court held that the language of the claim of a patent cannot be enlarged by the courts although it may not be broad enough to cover the actual invention of the patentee.

In *Seabury vs. Johnson*, 76 Fed. 456, the court in construing the claims of a patent said:

“The inventor, for reasons doubtless satisfactory to himself, deliberately limited his claim to a ‘metallic band,’ although it is quite clear from the words of the specification that he was perfectly well aware that bands of other material might suffice. Believing that metal bands were preferable he deliberately chose them for his monopoly, and chose them only. His act in so doing was nothing more or less than a declaration that he abandoned to the public the right to use bands which were non-metallic. The law of patents requires that the patentee shall particularly specify and point out the part, the improvement, or the combination which he claims as his invention or discovery. Courts are bound by the language chosen by the inventor; and they have neither the right nor the power to enlarge a patent beyond the scope of its claim as allowed by the Commissioner of Patents. When the terms of a claim in a patent are clear and distinct, the patentee in a suit for infringement is bound by it. He is absolutely barred from attempting to show that his invention or discovery is larger and broader than the terms of the claim.”

In *Harder v. U. S. Piling Co.*, 160 Fed. 463, the Circuit Court of Appeals, in construing the claims of a patent, said:

“Now a patent is to be sustained, not for what an inventor may have done in fact, but only for what he ‘particularly points out and distinctly claims’ in his open letter.”

Hardison v. Brinkman, 156 Fed. 692, and *Day Time Register Co. vs. Syracuse Time Recorder*

Co., 161 Fed. 111, are cases which hold that a patentee is bound by the language in the claims of his patent, even though he may have been entitled to make broader claims and that the courts cannot alter or enlarge the claims of a patent.

There are scores of other cases on this question of construction of the claim of a patent, but it seems that those which we have herein cited and quoted from are abundantly sufficient to satisfy the court beyond any possible question, as to what the law governing such construction is. To pursue the subject further, would, it seems to us, be mere surplusage.

Under the law which we have pointed out to the court, there can be no escape from the conclusion that the plaintiff in this case is absolutely confined and limited to the language of the claims of the patent and is estopped, from contending for anything in excess of the plain and clear import of his claims. In other words, in his patent he must once and for all time exercise his right to claim what he has invented. When he has exercised that right his rights as well as those of others become defined and vested and he is forever debarred from making any claim other than what is clearly within the enclosure which he has voluntarily constructed. He deliberately draws the line which separates that which is his, from that which is others and no sense of justice should permit him

after controversy has arisen, to alter, extend or change that line in the slightest particular. If he erred in his choice he can blame no one but himself. Claims of a patent effect and define substantial rights and it must follow as a matter of necessity that they be strictly construed and construed against the party who had the right to claim little or all as he thought wise. To permit him to adjust or expand his claim as his needs arise is to say that the public has something today and nothing tomorrow. The theory and justice underlying this principle of construction is so patent that it seems unnecessary to labor the point further.

In this patent he has confined himself to the glass construction. He says he claims a "structure" of a "plurality of glass plates" spaced from each other, a "felt cushion" filling the space, the "plates being *cemented* to the felt." Nowhere in either claim is there the slightest intimation or even the vaguest kind of a suggestion that he claims the construction of the joints where wood and glass come together or that his invention embraces the construction of the wood and glass joints in any form or that he claims any particular adhesive must be used. He employs the "felt" and "elastic material" between all the glass plates where they would otherwise come in contact but by no stretch of imagination does he claim to employ the felt or elastic material in any other joints.

It is submitted in all candor that there is not a word in either claim that justly can be contended to intimate in any sense that the patentee claimed the back top joint where the top plate of glass is joined to the back wood frame or the adhesive substance that is to be used. The expressions he employed, and that is what governs, do not embrace anything but the all-glass joints. If he did not say all he might have said or perhaps all that he may have intended to say, he should be the loser and not those who have in no manner been delinquent. With the patent confined to the all-glass joints it requires no argument to show that the distinction plaintiff is endeavoring to make between Whitcomb's cases and the patent consisting of the screws in the back top joints of some of Whitcomb's cases is no distinction at all. They are clear without the scope of the patent and, of course, any tenable distinction must concern something within the claims of the patent.

The attempted distinction based upon the claimed difference in the adhesive used is equally untenable. The claims of the patent do not cover cement and do not even require that cement be used. That is simply another matter that the patent does not cover. A simple reading of the claims will be sufficient to exclude any distinction based on the different adhesive mixtures used even if it were shown that the mixtures were not the same. The first claim requires that the glass

plates be "*cemented*" together but is entirely silent as to *what* they shall be *cemented with*. You may use anything that will adhere the glass and felt together. The term "*cemented*" as used in the claim is obviously intended to direct that the glass and felt be adhered together with material having adhesive qualities. The second claim directs that the plates be "*attached*" to the "elastic material" without in any manner indicating *how or with what material* the attachment shall be made. In one case when you have "*cemented*" the plates and felt together and in the other when you have "*attached*" the plates to the elastic material you have done all the claims call for and have infringed the patent. Then going back to the familiar rule that "*that which infringes, if later, anticipates if earlier,*" a clear case of anticipation is shown if in the Federman and Cooper cases the felt and glass were *cemented and attached together* with some material that made an adhesive connection. That, that very thing was performed and practiced by Whitcomb as early as 1899 cannot well be disputed.

Now, there is another point of law equally as well established that is fatal to a portion of each of the claims of the patent. It is clearly the law that the function, result, accomplishment, operation or adaptation of a machine or thing is not patentable. The patent can only cover the actual physical concrete thing itself. The means and

not the end is patentable. If the result, and so forth, flow from the use of the means all well and good. The patentee is entitled to obtain results and functions that come from the use of his means but he cannot cut off the rights of others to accomplish the same result and function by substantially different means. If some other person can secure an elastic joint in a showcase by substantially different means than that employed by Weber he has a clear right to do so, and even to procure a patent. The elastic result is not patented, but simply the method of construction. We contend that the claims of the patent in suit covers more than the actual physical means and lap over and attempt to claim the result and function presumed to flow from the means. Just so far as the patent covers a function it is void.

We contend that the latter portion of claim one, is invalid because it is functional; that the functional part of said claim is stated as follows:

“Each plate being adapted to freely vibrate in its natural plane of vibration and prevented by the felt cushion from imparting its vibration to the adjacent plates.”

The portion of the second claim that we contend is functional and invalid is:

“Whereby the plates by reason of their unconfined edges and the intervening elastic material can each vibrate or move in any direction independently.”

Now the gist of the objectional part of claim one is that each plate is adapted to vibrate without imparting its vibration to the other plates. It would seem that a mere reading of it shows that it does not claim anything physical and concrete but rather the result that is claimed to follow the physical means that is set up immediately preceding. He is clearly claiming the alleged beneficial result that follows his method of construction and that is precisely what the law does not permit. The result is open to the public at all times. The only thing that can be monopolized is the means of attaining that result in a certain way. Any one that can attain the result in a substantially different way has a perfect right to do so. The adaption to vibrate and the preventing the imparting of vibration is the result of the use of the felt cushion. He can claim the felt cushion. It is the physical and tangible means. He cannot claim the vibration and so forth. That is a result of the use of the felt cushion. The same thing can be said of the objectionable portion of claim two. There again he is claiming the vibration that results from the use of the elastic material. In each instance up to the quoted portion of the claims he has claimed the physical construction—the means, and that is as far as the law permits him to go. The moment he exceeds that he is attempting to appropriate that which he

can, in no event, be entitled to. Let us look at some of the cases on this point.

The case of *National B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693, which plaintiff cited to no purpose, covers this point very clearly where the court says:

“Now, the function or result of the operation of a machine or combination is not patentable under our laws and therefore the camber in the beam could not be monopolized by means of a patent. The means, the mechanical device, by which that camber was produced and that alone was capable of protection by such a franchise.” (Eight cases from the Supreme Court are cited in support of that statement.)

In *Columbus Watch Co. v. Robbins*, 64 Fed. 384, Judge Taft, speaking on behalf of the Circuit Court of Appeals, said:

“But it is said the claims * * * are void because they seek to appropriate results or functions, rather than means or devices for accomplishing results. Unless the claims are to be restricted by construction, this criticism is a just one. The inventor, in his first claim, seeks to monopolize a train ‘*adapted*’ to be placed in engagement with the winding or setting wheels. * * * In the light of the Corn Planter Decision, it is evident that they must be limited to the particular mechanism * * * *securing the adaption* referred to in the claim.”

In *National Cash Register Co. v. Boston Cash*

Recording Co., 156 U. S. 502, 39 L. Ed. 511, the court said:

“There is no conflict here with the principle laid down by this court in *Knapp v. Morse*, 150 U. S. 221, and *Wollensak v. Sargent*, 151 U. S. 227, that the end or purpose sought to be accomplished by a device is not the subject of a patent but only the new and useful means for obtaining that end.”

Other cases holding that the result, function and so forth are not patentable and that only the physical means employed to secure the results are patentable are as follows:

Fuller v. Yentzer, 94 U. S. 288; 24 L. Ed. 103.

Disdon v. Medart, 158 U. S. 68; 39 L. Ed. 899.

Knapp v. Morse, 150 U. S. 221; 37 L. Ed. 1059.

Westinghouse v. Boyder, 170 U. S. 537; 42 L. Ed. 1136.

Corning v. Burden, 15 How. 252; 14 L. Ed. 683.

Plaintiff closes its brief with a subdivision entitled “Opinion of Judge Rudkin in Dismissing the Bill,” and takes issue with the District Judge in deciding the case in the court below. Much of the controversy with this decision gets back to the question concerning the cement or adhesive sub-

stance used by Whitcomb. It seems to us that this question does not require further discussion from us as we have already clearly shown that the patent does not require the use of any particular cement and if that is true no particular cement is required in order to constitute an anticipation. The Judge is criticized because in the record he is made to state that a strip of felt was placed between the plates "and" the joint. If counsel will refer to his copy of the Judge's opinion he will find that the word "and" used in the record is a substitution for the word "at" used by the Judge.

Then counsel assert that the patent cases have elastic joints made with felt and ordinary cement, the cement not permeating the felt. We again deny that the construction under the patent necessarily requires ordinary cement or any cement at all and this record does not disclose what, if any, cement the patent holder uses. Whether the cement or adhesive substance used by the patent holder actually permeates the felt or not is a question that is not in any way touched by the testimony in the case. Then counsel proceed with their oft repeated and baseless assertion that the cement used by Whitcomb permeated the felt and made a rigid joint. We have denied this so frequently that we may be imposing upon the court to reiterate the denial. However, our contention to the contrary is so clearly supported by the tes-

timony that we do not feel like letting a single assertion of this character, made by the plaintiff, go unchallenged.

Then plaintiff just before closing assumes a hypothetical case which is based upon the unwarranted assumption as to the facts in the case and is already disposed of by our contentions heretofore made. We earnestly contend that the same results accomplished by the patent were and are accomplished in the Cooper and Federman cases.

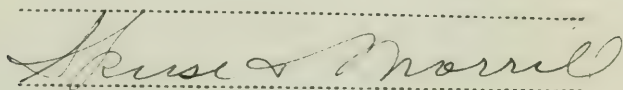
In closing we submit that it has been proven beyond any doubt whatever that show cases made in at least substantial accordance with the claims of the patent were in public use in this country more than two years prior to the application for the patent sued upon and that it is clearly shown that the patentee Weber was not the first or original inventor of any substantial part of the device patented as is required by Section 4920 of the U. S. R. S. That the defenses set up in subdivisions four and five of U. S. R. S. 4920 have been abundantly sustained in accordance with all the applicable rules of evidence, would seem to be beyond any real controversy. It seems equally clear that plaintiff's contention as to accident, experiment and so forth are wholly without support in the evidence.

We also submit that the distinctions attempted to be drawn by the plaintiff between the antici-

pating cases and the patent are not within the claims of the patent; that the patent cannot be construed to include the top back joint of the showcase where the glass joins with the back wood frame; that the patent does not require the use of any particular adhesive substance, and any adhesive substance which will adhere glass to felt comes within the claims of the patent and is sufficient to constitute an anticipation; that portions of each claim of the patent are functional and therefore void.

The patent in suit should be held to be invalid and the decree of the lower court affirmed.

Respectfully submitted,



S. H. CUTTING.

Attorneys for Defendant.

United States
Circuit Court of Appeals
For the Ninth Circuit.

MANHATTAN CANNING COMPANY, a Corpora-
tion,

Appellant,

vs.

J. W. WILSON,

Appellee.

Apostles.

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

FILED

APR 11 1914

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*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING COMPANY, a Corpo-
ration,

Respondent.

Names and Addresses of Counsel.

JAMES KIEFER, Esquire, 654 Colman Building,
Seattle, Washington,
Proctor for Libelant and Appellee.

CHARLES W. DORR, Esquire, 375 Colman Build-
ing, Seattle, Washington;

HIRAM E. HADLEY, Esquire, 375 Colman Build-
ing, Seattle, Washington;

CLYDE M. HADLEY, Esquire, 375 Colman Build-
ing, Seattle, Washington;

FREDERICK W. DORR, Esquire, 375 Colman
Building, Seattle, Washington;
Proctors for Respondent and Appellant.

[1*]

*Page-number appearing at foot of page of original certified Record.

TITLE OF CAUSE:

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING COMPANY, a Corpo-
ration,

Respondent.

Statement [of Clerk U. S. District Court].

NATURE OF ACTION:

Libel *in personam* for wages, maintenance and ex-
penses of cure.

DATE OF COMMENCEMENT OF THE AC-
TION:

Libel filed May 16, 1913.

Citation served May 19, 1913.

NAMES OF PARTIES:

James Wilson, libelant and appellee.

Manhattan Canning Company, a corporation, re-
spondent and appellant.

DATES OF FILING PLEADINGS:

Libel: May 16, 1913.

Answer and exceptions of respondent: May 27th,
1913.

Amended answer of respondent: July 7th, 1913.

Exceptions to amended answer: July 11, 1913.

REFERENCE:

Referred to A. C. Bowman, United States Commissioner, to take testimony and to make findings of fact and conclusions of law. Result of reference, findings in favor of libelant and against respondent in the sum of \$520.00 and costs, which findings were confirmed by the Court over the exceptions of respondent.

FINAL DECREE:

Signed and filed: January 19, 1914.

NOTICE OF APPEAL:

Filed January 27th, 1914. [3]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING CO.,

Respondent.

**Libel in Admiralty for Wages, Maintenance and
Expenses of Cure.**

The libel of J. W. Wilson, late seaman on board the American brig "Harriet G.," whereof J. A. McInnis was master, against the Manhattan Packing Co., in a cause of wages and expenses, civil and maritime, alleges as follows:

I.

That the respondent, Manhattan Packing Co., is

Whereupon the libelant prays that a citation in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said Manhattan Packing Company; and that it may be required to appear and answer under the oath of its officers this libel and all and singular the matters aforesaid, and the interrogatories hereto attached; and that this Honorable Court would be pleased to decree the payment of the wages of the libelant for said voyage, the expenses of his cure and his maintenance during said period; and that he may have such other and further relief as in law and judgment he may be entitled to receive.

JAMES KIEFER,

Proctor for Libelant. [6]

Western District of Washington,
County of King,—ss.

J. W. Wilson, being first duly sworn, on oath deposes and says: That he is the libelant above named, has heard the foregoing libel read, knows the contents thereof and that the same is true.

J. W. WILSON.

Subscribed and sworn to before me this 16th day of May, 1913.

[Seal]

JAMES KIEFER,

Notary Public in and for the State of Washington,
Residing at Seattle, Wash.

[Indorsed]: Libel *in Personam*. Filed in the U. S. District Court, Western Dist. of Washington, May 16, 1913. Frank L. Crosby, Clerk. By ————, Deputy. [7]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING CO.,

Respondent.

Affidavit for Suit in Forma Pauperis.

Western District of Washington,
County of King,—ss.

J. W. Wilson, being first duly sworn on oath, according to law, says: That he is the libelant above named; that he is an American citizen, and a seaman, and a resident of the Western District of Washington; that he has fully and fairly stated the facts upon which he sues in this cause, as set out in his libel by his proctor, James Kiefer; that he is advised by his said proctor that he has a meritorious cause of action.

Affiant further says that he is unable, for want of means, to give security for costs, or to advance costs, and therefore prays to be admitted to prosecute this action without the payment of costs and without giving security for costs.

J. W. WILSON.

Subscribed and sworn to before me this 16th day of May, 1913.

[Seal]

JAMES KIEFER,
Notary Public in and for the State of Washington, Residing at Seattle. [8]

**[Order Granting Libelant Leave to Begin Action in
Forma Pauperis, etc.]**

On reading the foregoing affidavit it is by the Court ordered that the libelant have leave to begin his action *in forma pauperis*, and that process due issue *in personam* returnable according to rule May 29th, 1913.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington, May 16, 1913. Frank L. Crosby, Clerk. By —————, Deputy. [9]

*In the District Court of the United States, in and
for the Western District of Washington, North-
ern Division.*

IN ADMIRALTY—No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING COMPANY,

Respondent.

Exceptions and Answer of Respondent to Libel.

To the Honorable EDWARD E. CUSHMAN, Judge
of the District Court of the United States,
for the Western District of Washington, Sitting
in Admiralty:

The Manhattan Canning Company, by its proctors,
Dorr & Hadley, excepts to the libel filed in this cause:

First: Because from the allegations of the libel it
appears that libelant's employment ceased before the
commencement of the voyage, and that libelant is
therefore not entitled to the relief claimed, to wit,
wages for the entire voyage, nor is libelant entitled to
wages under the allegation of the libel for any period
to exceed one month.

And further answering the libel, respondent alleges
as follows:

I.

That the allegations of the first article of the libel
are true, except as to the name of respondent, whose
true name is the Manhattan Canning Company.
[10]

II.

That respondent has not sufficient knowledge or
information to form a belief as to the truth or falsity
of the third, fourth, and fifth articles of the libel, and
therefore denies the same.

III.

Referring to the sixth article of the libel respondent
admits that said brig "Harriet G." has departed
for Alaska, with a cook other than libelant, and as to

each and every other allegation in said sixth article contained, respondent alleges that it has neither information nor knowledge sufficient to form a belief as to the truth or falsity of said allegations, and therefore denies the same.

WHEREFORE the respondent prays that the Court will pronounce against said libel and dismiss the same with costs.

DORR & HADLEY,
Proctors for Respondent.

State of Washington,
County of King,—ss.

S. Harrington, of said county and State, being first duly sworn, on his oath deposes and says: That he is an officer, to wit, secretary of the respondent corporation Manhattan Canning Company in the above-entitled action, and makes this affidavit as such officer for said respondent; that he has read the foregoing answer, knows the contents thereof, and that the statements and allegations therein contained are true, as he verily believes.

S. HARRINGTON.

Subscribed and sworn to before me this 26th day of May, A. D. 1913.

[Seal]

CLYDE M. HADLEY,
Notary Public in and for the State of Washington,
Residing at Seattle. [11]

Service of the within Answer is accepted and receipt of copy admitted this — day of May.

JAMES KIEFER,
Attorney for Libelant.

[Indorsed]: Exceptions and Answer of Respondent to Libel. Filed in the U. S. District Court, Western Dist. of Washington. May 27, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [12]

[Decision on Exceptions to Libel.]

*In the District Court of the United States, Western
District of Washington, Northern Division.*

No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING COMPANY, a Corporation,

Respondent.

Filed June 19, 1913.

JAMES KIEFER, for Libelant.

DORR & HADLEY, for Respondent.

CUSHMAN, District Judge.

This cause is for decision upon the exceptions of the respondent to the libel, which is one for wages, maintenance and expenses of cure.

On the 21st of April, 1913, libelant shipped as cook on the brig "Harriet G.," at Seattle—its home port—for a voyage of six months duration to Port Heiden, in Alaska, the agreed wages being eighty dollars per month. He began the discharge of his employment the same day, continuing therein until the 23d day of April, 1913, when, at Seattle, while the vessel was being towed from the dock to anchorage, libelant fell

from the companionway leading from the poop deck to the main deck—alleged to be without fault on his part, and, in falling, struck a pile upon the deck of the vessel, and received certain injuries rendering him unable to longer continue in the services of the ship, or perform his duties as cook.

At the direction of the master, he was removed from the vessel to a hospital in the city of Seattle, where it is [13] alleged he remained until the 5th day of May, 1913, incurring a hospital bill of Thirty & 60/100 Dollars, and a physician and surgeon's bill of Fifty Dollars. It is alleged that he is still sick and will be unable to work at his occupation, or at all, for six months, that his necessary expenses for maintenance ashore has been One and 50/100 Dollars per day; that he will require further medical attendance which he estimates at Fifty Dollars; that the vessel has left the port of Seattle for Port Heiden, and that there is no system of communication between Seattle and the port of Heiden, by which libelant could rejoin said vessel should he recover.

The libel is excepted to upon the ground that, in any event, libelant—under section 4527 R. S., 6 Fed. Stat. Ann., p. 864—is only entitled to one month's wages in addition to those already earned at the time of his leaving the vessel. This section provides:

“Any seaman who has signed an agreement and is afterward discharged before the commencement of the voyage or before one month's wages are earned, without fault, on his part justifying such discharge, and without his consent, shall be entitled to receive from the master

or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the court hearing the case, of having been improperly discharged, recover such compensation as if it were wages duly earned."

If this section includes cases other than those of wrongful discharge, it is inapplicable to a coastwise voyage of the nature of the one set up in the libel. The above section was one of those in the shipping commission act of June 7, 1872, Chapter 327, 17 Stat. L., 262; and was, so far as the voyage here in question is concerned, repealed by the Act of June 9, 1874, 18 Stat. L., 64; vol. 6 Fed. Stat. Ann. 850, which later act provides:

"That none of the provisions of an act entitled 'An act to authorize the appointment of shipping commissioners by the several Circuit Courts of the United States to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen' shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific [14] coasts, or in the lake--going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are by custom or agree-

ment entitled to participate in the profits or result of a cruise, or voyage."

Dary vs. The Caroline Miller, 36 Fed. 507.

This appeal is still effective, as, so far as the section relied upon by respondent is concerned, there has been no re-enactment.

Under the maritime law, the libelant would be entitled to the expenses of his cure and maintenance while injured, together with his wages for the voyage.

W. L. White, 25 Fed. 503;

The Robert C. McQuillen, 91 Fed. 688;

Olson vs. Whitney, 109 Fed. 80;

The Bunker Hill, 198 Fed. 587;

Peterson vs. Chandos & Master, 4 Fed. 645;

Highland vs. Harriet C. Kerlin, 41 Fed. 222.

The question whether libelant would be entitled to recover, on the showing in his libel, the wages prior to the expiration of the six months for which he shipped, was not argued upon the exceptions, nor considered.

The exceptions are overruled.

[Indorsed]: Decision on Exceptions to Libel. Filed in the U. S. District Court, Western Dist. of Washington. June 19, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [15]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING COMPANY, a Corpo-
ration,

Respondent.

Amended Answer.

Comes now the Manhattan Canning Company, respondent in the above-entitled libel, and by stipulation of counsel for libelant and respondent files this its amended answer to the libel of James Wilson, in a cause of wages, civil and maritime, and alleges as follows:

I.

That the allegations of the first article of the libel are true, except as to the name of respondent, whose true name is the "Manhattan Canning Company."

II.

That respondent denies each and every allegation contained in the second, third, fourth and fifth articles of the said libel. [16]

III.

Referring to the sixth article of said libel, respondent admits that said brig "Harriet G." has departed for Alaska, with a cook other than libelant; and as to each and every other allegation in said sixth article

contained, respondent alleges that it has neither information nor knowledge sufficient to form a belief as to the truth or falsity of said allegations, and therefore denies the same.

And for a further and first affirmative defense, respondent alleges:

I.

That the shipping articles signed by libelant for the voyage, described in the libel, expressly stated that the time of service should be from the date of sailing from, until return to Seattle, Washington.

II.

That the brig "Harriet G." sailed from Seattle, Washington, to Port Heiden, Alaska, on April 25, 1913, and that libelant's term of employment had not yet commenced at the time of the alleged injury, as stated in the libel.

And as a further and second affirmative defense, respondent alleges: [17]

I.

That in the shipping articles of the brig "Harriet G.," which libelant signed, as aforesaid, it was expressly stated that libelant was not to bring any intoxicating liquors on board, and that libelant was to conduct himself in a careful and sober manner; and these conditions were part of the consideration for the agreement of respondent to pay the wages to libelant.

II.

That libelant, in violation of said condition in the shipping articles, brought a quantity of intoxicating liquor on board, and that libelant drank a quantity

of intoxicating liquor, so that he was unable, while on board the said brig, prior to entering the service of respondent, or at all, to conduct himself in a careful and sober manner; and that libelant, during said time, wholly failed and neglected to conduct himself in a careful and sober manner.

Wherefore, the respondent prays that the Court will pronounce against said libel and dismiss the same with costs.

DORR & HADLEY,
Proctors for Respondent. [18]

State of Washington,
State of King,—ss.

S. Harrington, being first duly sworn, on his oath deposes and says: That he is an officer, to wit, secretary of the Manhattan Canning Company, the corporation named as respondent in the above-entitled action, and makes this affidavit on behalf of said corporation as such officer; that he has read the foregoing amended answer, knows the contents thereof, and that the statements and allegations therein contained are true, as he verily believes.

S. HARRINGTON.

Subscribed and sworn to before me this 7th day of July, A. D. 1913.

[Seal] FRED W. DORR,
Notary Public in and for the State of Washington,
Residing at Seattle.

Service of the within Amended Answer is accepted and receipt of copy admitted this 8th day of July, 1913.

JAMES KIEFER,
Attorney for Libelant.

[Indorsed]: Amended Answer. Filed in the U. S. District Court, Western Dist. of Washington. July 8, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [19]

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING COMPANY, a Corpor-
ation,

Respondent.

Exceptions to Amended Answer.

Comes now the libelant by James Kiefer, his proctor, and excepts to the amended Answer filed herein on behalf of the respondent as follows:

I.

Libelant excepts to the first affirmative defense pleaded in said Answer upon the following grounds and for the reasons following:

1st: That said affirmative defense is insufficient.

2d: That the allegations of said affirmative defense are impertinent.

II.

Said libelant excepts to the second affirmative defense pleaded in the amended Answer upon the following grounds and for the following reasons:

1st: That said second affirmative defense is insufficient.

2d: That the allegations of said second affirmative defense are impertinent.

JAMES KIEFER,

Proctor for Libelant. [20]

Copy of within Exceptions received and service of same acknowledged this 11th day of July, 1913.

DORR & HADLEY,

Proctors for Defendant.

The office of the undersigned, 654-5-6 Colman Building, Seattle, Washington, is designated as the place at which service of all subsequent papers in this cause, except writs and process, may be made, and the undersigned hereby consents that service may be made at the said place of all subsequent papers, except writs and process.

JAMES KIEFER,

Attorney for Libelant.

[Indorsed]: Exceptions to Amended Answer. Filed in the United States District Court, Western District of Washington, July 11, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [21]

[Order Overruling Exceptions to Amended Answer.]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2477.

JAMES WILSON,

Libelant,

vs.

MANHATTAN CANNING CO.,

Defendant.

Now, on this day this cause comes on for hearing on Exceptions to Amended Answer, the libelant being represented by James Kiefer and the respondent by Messrs. Dorr & Hadley, and the Court after hearing argument of respective counsel overrules said exceptions.

Dated July 14, 1913.

Journal 3, page 183. [22]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING COMPANY,

Respondent.

Testimony Reported by U. S. Commissioner.

To the Hon. EDWARD E. CUSHMAN, Judge of the
Above-entitled Court:

Pursuant to the stipulation hereto attached, the parties appeared before me on this 23d day of May, 1913, the libelant in person and by James Kiefer, Esq., his proctor, and the respondent by Mr. C. M. Hadley, one of its proctors. Thereupon the following proceedings were had and testimony offered:

Libelant's Testimony.

[Testimony of C. C. Young, for Libelant.]

C. C. YOUNG, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. KIEFER.) Where do you live?

A. Seattle.

Q. What is your business? A. Bartender.

Q. Do you know Mr. Wilson here, the libelant?

A. Yes, sir.

Q. Did you see him on the 23d of April last?

A. I did.

Q. Where? [23]

A. Saw him on the waterfront aboard ship.

Q. Do you know what ship?

A. It was the "Harriet G."

Q. What time of day did you see him.

A. It was some time after dinner. I could not exactly state what time, but somewhere between 12 and 2 or half-past two, or three, somewhere along there.

Q. Some time after dinner? A. Yes, sir.

(Testimony of C. C. Young.)

Q. What was he doing there?

A. He just came out of the cook kitchen there, came on deck and he saw me standing there and spoke to me. He says, "I will be back in a minute," and he went down into the cabin.

Q. I will ask you what his condition was as to being drunk or sober.

A. Perfectly sober; I do not think he had had a drink or smell of it.

(No cross-examination.)

Testimony of witness closed. [24]

[Testimony of A. Altemose, for Libelant.]

A. ALTEMOSE, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. KIEFER.) Do you know Mr. Wilson here, the libelant? A. Yes, sir.

Q. You live in the city here? A. Yes.

Q. What is your business? A. Carpenter.

Q. Were you down at the dock where the bark "Harriet G." lay on April 23? A. Yes, sir.

Q. Did you see Wilson, the libelant, there?

A. Yes, sir.

Q. About what time of day did you see him?

A. I could not tell just what time; some time after the noon hour.

Q. And what was he doing there?

A. He came out of the kitchen and walked back and spoke a few words to us. He said he would be back, and went into—I don't know what they call it—cabin, or whatever it was. He said he would be

(Testimony of A. Altemose.)

back in a few minutes, and that is the last I seen of him.

Q. You did not wait long enough for him to come back? A. No, sir.

Q. What was his condition—drunk or sober?

A. He seemed to me to be perfectly sober.

Q. You knew him before that time, didn't you?

A. Yes, sir.

Q. And had been acquainted with him for some time? A. Yes, sir. [25]

Q. If he had been drunk would you have noticed it? A. I would.

Cross-examination.

Q. (Mr. HADLEY.) You say this occurred as the boat lay alongside the dock?

A. Yes, the boat lay alongside the dock.

Q. And you were standing on the dock?

A. Standing on the rail of the dock.

Q. Was he aboard? A. Yes, sir.

Redirect Examination.

Q. (Mr. KIEFER.) How close were you to Wilson when you spoke to him?

A. Oh, about 12 feet. I was standing on the dock and he was on the boat. I was right on the rail on the side of the pier.

(Testimony of witness closed.) [26]

[Testimony of J. D. McDonald, for Libelant.]

J. D. McDONALD, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. KIEFER.) Were you aboard the "Har-

(Testimony of J. D. McDonald.)

riet G." on April 23 last? A. Yes, sir.

Q. What were you doing on board of her, what employment?

A. I was watchman on there for a couple of weeks, that is, before that for a couple of weeks.

Q. Do you know the libelant here, J. W. Wilson?

A. Yes, he was cook on there for that length of time.

Q. And did you see him there the afternoon of the 23d of April? A. On the afternoon?

Q. Yes.

A. No, sir, not afternoon, but close to noon I left the ship. The ship was going away. I had settled up and left about 11 o'clock.

Q. You did not see him in the afternoon?

A. Not in the afternoon, because I was ashore.

Q. What was his condition as to being drunk or sober at the time you saw him last?

A. Oh, he was perfectly sober. He was about his work in the galley and on leaving there I came to bid him good-bye, etc.

Q. Now, will you describe the condition of the ship? Do you know the companionway that leads from the poop-deck down? A. Yes, sir, I do.

Q. Prior to the loading of the ship was there a step or steps near the aft of the companionway to come down? [27]

A. Yes, there was, built in when the ship was built, about five steps, five or six steps high from the main deck up to what is called the break of the poop.

(Testimony of J. D. McDonald.)

Q. Now, on the 23d of April were these steps still there?

A. No, sir, and they were taken away. There was a small deckload of some piling, that had the bark taken off. They were probably a foot high or so, and the steps were taken away from there altogether.

Cross-examination.

Q. (Mr. HADLEY.) Do you know when the steps were taken away?

A. Well, it must have been a day, perhaps before that, or a half a day. They just took them out to put the deckload on; it was not a deckload, only a small quantity.

Q. Do you mean the regular steps to the break of the poop were removed?

A. Yes, sir, removed, and some kind of a deckload, a small quantity of piling was put in there instead. The steps were in the way of the deckload; I suppose that is the reason that they took them away.

Q. How much of a drop would that make with the steps removed and the piling in place of them?

A. About three feet. About three feet from the poop down to this small deckload; you know from there down would be about three feet.

Q. (Mr. KIEFER.) From the poop to the top of the timbers? A. Yes, sir.

Q. (Mr. HADLEY.) And that was the condition when you left the boat? [28]

A. Yes. A few hours, I guess a couple of hours before the ship pulled out. I was watchman on her

(Testimony of J. D. McDonald.)

a couple of weeks and they paid me.

Q. What time did the ship pull out?

A. One or two, some place like that. I was not right there when the ship pulled out. I was on the wharf and saw her pass out, and met the captain and another man coming uptown; she was pulling off to the buoy.

Q. And what time did you say you saw the libelant last?

A. About 11 o'clock, near dinner; he was busy in the galley getting dinner ready for the rest of us, is all.

(Testimony of witness closed.) [29]

[Testimony of Mathew Murry, for Libelant.]

MATHEW MURRY, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. KIEFER.) Mr. Murry, you live here in Seattle? A. Yes, sir.

Q. What is your business? A. Chauffeur.

Q. Driving a taxicab? A. Yes, sir.

Q. Were you doing that on the 23d of April last?

A. Yes, sir.

Q. Did you see this man Wilson here, the libelant, on that day? A. Yes, sir.

Q. Did you drive him anywhere that day?

A. Took him from the Lillico dock to Providence Hospital.

Q. What was his condition, what did he appear to be suffering from? A. Dislocated shoulder.

Q. Did you observe his condition as to being drunk or sober?

(Testimony of Mathew Murry.)

A. It appeared to me that the man was in great pain; he did not seem to be drunk, to my observation.

Q. Would you say that he was sober?

A. Perfectly.

Q. About what time of day was that?

A. It was somewhere around six o'clock. I could not say exactly, but somewhere around six o'clock in the evening.

Cross-examination.

Q. (Mr. HADLEY.) When you left him at the hospital, were [30] you of the same impression as to his condition? A. Yes, sir.

(Testimony of witness closed.)

Hearing adjourned. [31]

Seattle, Washington, June 20, 1913.

PRESENT: Mr. KIEFER, for the Libelant.

Mr. DORR, for the Claimant.

Mr. KIEFER.—I offer the depositions heretofore taken in this case under stipulation.

[Deposition of Mr. Roy Lillico, for Libelant.]

Mr. ROY LILLICO, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. KIEFER.) You may state your business.

A. Tow-boats.

Q. You operate a launch here in Seattle harbor?

A. Yes, sir.

Q. State whether or not you brought a man from the "Harriet G.," the bark "Harriet G.," anchored in the harbor at that time, on the 23d of April last.

A. Yes, I brought a man ashore.

(Deposition of Roy Lillico.)

Q. About what time of day was it?

A. Some time in the afternoon—I should judge about two or three o'clock.

Q. Do you know the man's name?

A. No, I do not know the man's name.

Q. Is this the man, the libelant here?

A. Yes, sir.

Q. What was his condition at that time?

A. Why, they told me that the man was hurt—the mate told me the man was hurt and they wanted to send him ashore.

Q. The mate of the "Harriet G."?

A. Yes, one of the mates, I don't know whether the second or first mate. So I took him aboard; he got over the [32] side and down into the pilot-house, with the help of one of the other men.

Q. Did the mate come ashore with him?

A. Well, I would not say about that.

Q. You could not say whether he did or not?

A. I would not say whether the mate or not, but a couple of men came ashore with him.

Q. From the "Harriet G."? A. Yes, sir.

Q. Do you know what was done with him when he got ashore? A. No, I do not.

Q. You did not see him taken any further than your launch?

A. No, he stayed aboard there, and I went ashore on the dock.

Q. What was the condition of this injured man—did he appear to be injured?

(Deposition of Roy Lillico.)

A. Why, he said he was; he had his coat thrown over his shoulder.

Q. Now, what was his condition at that time as to being drunk or sober?

A. He might have had a drink or two, but I do not think he was what you would call drunk.

Q. You would not say he was drunk?

A. No. He might have had a drink or two.

Cross-examination.

Q. (Mr. DORR.) What time in the day was this, Mr. Lillico, as near as you can fix the time?

A. I think it was in the afternoon between two and four.

Q. Somewhere there. [33]

A. It might have been five o'clock.

Q. Some time in the latter part of the afternoon?

A. Yes.

Q. Were you in charge of the boat?

A. Yes, sir.

Q. In the pilot-house? A. Yes, sir.

Q. This man was in the pilot-house with you?

A. He came ashore with me; he was in the wheel-house.

Q. The same place you were? A. Yes, sir.

Q. Why do you say he might have had a drink or two—was there anything to suggest that to you?

A. Well, it might have been, as I have seen a great number of men that had a drink or two; that is the way I express it. It might have been that he was hurt; his face was a little flushed, which might have been from the accident that he had had.

(Deposition of Roy Lillico.)

Q. You do not know anything about the accident except what some one told you about it? A. No.

Q. You do not know anything about it personally?

A. No, I don't know where he got hurt.

Q. Where was the "Harriet G." lying?

A. She was at the buoy, just lying up to the buoy.

Q. Out in the stream?

A. Yes, sir. She hadn't made fast yet.

Q. So that she had just moved out there?

A. Yes, sir.

Q. Did you move her out? [34] A. No.

Q. Were you sent out there to get this man, or did you just casually drop out there?

A. No; I think there were one or two men I took out there, but I was going out to a barge out in the bay with some men, and as I went alongside the "Harriet G." the mate told me to come alongside, that he had a man there to send ashore; I think it was the mate—it was one of the mates, first or second, I don't know which.

Q. Do you know whether anyone else came in with him or not?

A. There were two other men came in.

Q. Off the boat? A. Yes, sir.

Q. Do you know who they were?

A. No. They just came ashore to buy something. Something like that.

Q. In order to take care of him?

A. No; he sat in the wheel-house himself coming in.

Q. What did you do, if anything, after you got in?

(Deposition of Roy Lillico.)

A. I left the boat and left this man sitting in the wheel-house.

Q. And do not know what became of him after that? A. No, I do not.

Redirect Examination.

Q. (Mr. KIEFER.) One of these men might have been one of the mates, for all you know?

A. I do not know, it might have been. I know they said they were coming ashore to buy some stuff before they [35] went to sea.

Q. Now Captain, speaking of Wilson's condition at that time, you say he was not drunk. Was he able to handle himself and take care of himself?

A. Yes, he got into the wheel-house himself.

Q. Without assistance?

A. Yes. Of course he had to be assisted over the side of the boat, because there was no ladder or gang-way out there.

Q. There was nothing in his manner of handling himself to suggest intoxication?

A. No, I would not say that there was.

Q. (Mr. DORR.) He did not have to be assisted over the side any more than anybody would that was getting on the boat?

A. No, I don't think so. Of course he is a pretty heavy man to put over the ship's side into the launch, and not have assistance.

Q. About the same as any other heavy man?

A. That is all.

Q. (Mr. KIEFER.) Did he seem to be able to use his right arm?

(Deposition of Mark Leroy Kenyon.)

Q. What was the occasion of your being down there?

A. He was to take a dog of mine up to the Arctic on this boat.

Q. And you were down there to see him?

A. I was going down to see if the dog was going. The captain seemed to be dissatisfied with the *dock* and put him ashore just before the boat sailed, and I went down to see whether he was on board or not.

Q. You were close enough so that you could see on the [38] boat and look right down on the deck, were you? A. Yes, sir.

(Testimony of witness closed.) [39]

[Deposition of J. W. Wilson, in His Own Behalf.]

J. W. WILSON, the libelant, being duly sworn, testified in his own behalf as follows:

(Mr. KIEFER.) You are the libelant in this case?

A. Yes, sir.

Q. What is your business?

A. My business is cooking.

Q. Marine cook? A. Marine cook.

Q. How old a man are you? A. Fifty-nine.

Q. How long have you been following the occupation of marine cook?

A. Off and on for twenty-five years.

Q. Now, you shipped on the "Harriet G." on the 21st of April? A. Yes, sir.

Q. And what was your rate of wages?

A. Eighty dollars.

Q. For how long a voyage?

(Deposition of J. W. Wilson.)

A. Six months.

Q. To Port Hayden, Alaska?

A. Yes, and back to Seattle.

Q. Did you go to work on that day, on the 21st?

A. I worked four or five days before I signed, five or six days before I signed.

Q. Now, then, after you signed on you went to work? A. I was working then.

Q. You remained at the pier until when?

A. We left the pier between two and three o'clock, I believe. [40]

Q. On what day? A. On the 23d of April.

Q. On leaving the pier what happened to you?

A. There was a crowd of people on the dock. I was busy getting the men's supper so that they could go ashore in time, as I had to get it before we went to the buoy. I had just gone aboard and cleaned the dinner dishes up and I came out to the aft companionway to go down on the main deck, and she had a couple of poles, pilings and they were all slippery and I caught hold of a rope—there were no steps there, the steps had been taken away—I did not pay much attention—and down I went, and dislocated my left arm, my shoulder. As soon as I fell I told McDonald, told him my shoulder is out, that I had fallen. He says, "Yes, you got it badly bent," and so the second mate and he signed as boatswain, acted as second mate, and he says to him, "You take the steward ashore; take him to the hospital." So when this gasoline launch came, Captain Lillico, I was helped aboard the gasoline launch by the second mate.

(Deposition of J. W. Wilson.)

I went to the pilot-house and sat there until the second mate got a taxicab and took me to Providence Hospital.

Q. The second mate came ashore with you?

A. Yes. He went as far as the hospital and then he went back aboard the ship again.

Q. How long did you remain in the hospital?

A. I was pretty close on to two weeks,—I think 12 days, something like that.

Q. Now, did you have any bruises besides the dislocation of the left shoulder? [41]

A. The dislocation of my shoulder.

Q. Any other bruises besides that?

A. My side was a little scratched—that happened about two weeks before that, I slipped on the dry-dock.

Q. In this fall did you receive any other injuries besides that left shoulder?

A. No, sir, just the left shoulder, sir.

Q. And have you been able to work since?

A. No, sir.

Q. Are you able to work now?

A. No, sir. I can lift my arm up that way that far, but not up to my head, this way. I cannot lift it this way. Every time I move my shoulder it hurts.

Q. It is sore yet? A. Yes, sir.

Q. Does it pain you? A. Sometimes.

Q. How much of a bill did the hospital present you?

A. I believe sixty dollars. You have the bill.

(Deposition of J. W. Wilson.)

Q. Is this the bill presented to you by the hospital?

A. Yes, sir. And fifty dollars for the doctor bill.

Mr. KIEFFER.—I offer this bill in evidence.

Paper marked Libelant's Exhibit "A," filed and returned herewith.

Q. What doctor attended you?

A. Dr. Godfrey.

Q. Mr. Wilson, at the time when you had this fall, what was your condition, were you drunk or sober?

A. Perfectly sober the same as I am now.

Q. Had you had anything to drink that day? [42]

A. No, sir.

Q. Now, after this injury did any of the ship's officers or any one on board the ship give you a drink of liquor? A. No, sir.

Q. After the injury?

A. I got a drink of whisky when I got ashore. I don't know where the second mate got it. It was just a little in a glass; he must have got it in a saloon.

Q. He gave you that on coming ashore?

A. Yes, sir.

Q. Now, since being sent off the vessel, have you been obliged to maintain yourself at your own expense?

A. Yes, I had nobody else to help. Nobody from the office came near the hospital, or the captain or nobody. They left me there destitute.

Q. About what is the expense of maintaining yourself on shore?

(Deposition of J. W. Wilson.)

A. It costs about two dollars a day to live on shore.

Cross-examination.

Q. (Mr. DORR.) Just describe a little more in detail, Mr. Wilson, how this accident occurred there, were you coming out of the cabin?

A. I came out of the cabin, I was going forward. Some people on the dock said, "Good-bye, Jack," and I says, "Good-bye." And I was just going to take a step down from the break of the poop, and there was no steps where the steps used to be, they were carried away ten or fifteen feet away from it, and there was slippery pilings underneath there where the steps ought to have [43] been; they were not covered with a board. When I seen myself falling I grabbed a rope with my left hand, and I stretched around and it gave my shoulder a wrench. I was going forward to the galley to finish supper.

Q. Your left shoulder was the one that was dislocated? A. Yes, sir.

Q. And was dislocated by grabbing hold of this rope? A. Yes, to prevent myself from falling.

Q. You did not fall down?

A. I did when my hand slipped, I could not hold my weight as I weigh pretty close to 300 pounds.

Q. How long had these steps been taken away?

A. The mate took them away that morning, I believe in putting the deadload on. I went around on the other side of the vessel when they were putting it on and working on that side.

Q. How high was it up there?

(Deposition of J. W. Wilson.)

A. Well, where the steps were it must have been about four feet. It comes to me about here. (Showing.)

Q. You had to go down on steps there where the stairs were? A. Yes, sir.

Q. You went down that four foot drop?

A. I did not drop that much. There must have been about a foot of deckload there. I dropped on top of the pilings.

Q. You tried to stop yourself by grabbing this rope, and that threw your shoulder out?

A. Yes, sir. [44]

Q. Now, you saw Mr. Kenyon there, did you?

A. Yes, sir.

Q. And were talking to him?

A. He says, "How are you?" I says, "All right; I am fine." He says, "How is the dog?" and I says, "The dog is ashore."

Q. Did you hear him testify here a moment ago,—were you here? A. Yes, sir.

Q. Did you hear him say that he was talking to you and you walked off and walked up the companionway?

A. That is before I hurt myself. That was before that. I went back to the cabin again.

Q. How did you walk back and walk up the companionway?

A. I was on the break of the poop, I was not on the main deck. I was in front of the cabin door, in front of the companionway.

Q. That is the same stairs, is it not?

(Deposition of J. W. Wilson.)

A. Oh, no. There is a four foot drop; there is another step running into the cabin. Here is the break of the poop and the stairs coming to the main deck; and these go into the cabin. I was standing on this break of the poop in front of the cabin door, in front of the companionway.

Q. He testified here that he saw you walk aft, walk up the companionway into the cabin?

A. He saw me coming aft from the companionway; that is what he testified.

Q. Now, you went to the hospital with the second mate? A. Yes, sir.

Q. Providence Hospital? [45] A. Yes, sir.

Q. Did you go in the Marine Hospital ward there?

A. I went where they took me, and the second mate took me there, and one of the sisters spoke to him and they got me in the elevator.

Q. Did they know you were a marine?

A. I told the doctor. He asked how I came there and I told the doctor what ship I came from and also told the sisters.

Q. Why didn't you go to the Marine Hospital?

A. I had to stay where they put me.

Q. You had a right to go to the Marine Hospital?

A. I stayed where they put me. I could not run from one place to another in the hospital. I stayed where they put me.

Q. Now, had you had anything to drink that day?

A. No, sir.

Q. You are not a drinking man?

A. No, sir, I never drink when I am working. I

(Deposition of J. W. Wilson.)

may take a glass of beer when ashore.

Q. Did you take liquor aboard?

A. What liquor I had the captain got.

Q. Do you know how much it was?

A. It was a case; never opened; he had it in his charge.

Q. Is it not a fact you took a case of whisky aboard?

A. The captain has got that, and the shipping commissioner knows it, and the captain had it under lock and key.

Q. Was it for your personal use?

A. No; it is to give to the fishermen when they get wet or something like that. [46]

Q. Was not that your personal property?

A. That was my property; yes.

Q. The case of whisky?

A. Yes, sir, with the captain's permission. And the captain took charge of it as soon as it came aboard.

Q. And the only drink you had that day was when you went ashore?

A. After I got ashore on the dock.

Q. Have you made any effort to get work since the accident?

A. No, sir. I could not do nothing. I could hardly button my pants in the back with this hand.

Q. You haven't done anything? A. No, sir.

Q. What has been the expense of that doctor bill?

A. Fifty dollars.

Q. Are you consulting a doctor at present?

(Deposition of J. W. Wilson.)

A. I saw him the other day and told him to come up here and he said he would. I haven't seen him since.

Q. He attended you while you were in the hospital?

A. Yes, sir. He had me under the X-ray to look at my shoulder.

Q. When did this injury occur, Mr. Wilson, with reference to the time the vessel started out?

A. It must have been between two and three o'clock, when the vessel pulled out. It might have been later. After I got my dinner dishes washed and had my supper on ready to dish out for the men to get ashore right early after they got to the buoy.

Q. This happened after you got away from the dock?

A. We were going out in the stream, we were just past the [47] end of the dock.

Q. Just after they cast off? A. Yes, sir.

Redirect Examination.

Q. (Mr. KIEFER.) You know from experience, do you, that they will not receive a patient in the Marine Hospital ward without a certificate from the master of the vessel? A. I know they do not.

Q. You know that to be a fact?

A. Yes, sir. The second mate took me and spoke to one of the sisters; and they sent me up stairs to the 5th floor.

Q. Now, Mr. Wilson, counsel has asked you whether you had done any work since the injury. Are you at present able to work at your occupation?

(Deposition of J. W. Wilson.)

A. No, sir; pretty hard with one hand to do cooking on board ship, handling big pots, lifting twenty gallon pots.

Q. A man has to use both arms?

A. Yes, sir, he has to use both arms.

Q. (Mr. DORR.) Have you paid any of these amounts that you are claiming in this libel?

A. I haven't paid nothing, sir. Haven't had no money to pay.

Q. These items that you claim in regard to the \$50 doctor bill and the \$30.60 hospital bills are on the statement that has been introduced in evidence?

[48] A. Yes, sir.

(Testimony of witness closed.)

Hearing adjourned until June 25, 1913, at 10:00 A. M. [49]

July 20, 1913.

Claimant's Testimony.

Proctor for respondent offers in evidence the shipping articles of the Bg. "Harriet G." certified by the shipping commissioner, for the voyage beginning April 21, 1913.

Articles marked Respondent's Exhibit "A," filed and returned herewith. [50]

Seattle, Washington, October 8, 1913.

PRESENT: Mr. KIEFER, for the Libelant.

Mr. DORR, for the Respondent.

[**Testimony of Capt. J. A. McInnis, for Respondent.**]

Capt. J. A. McINNIS, a witness called on behalf of the respondent, being duly sworn, testified as follows:

(Testimony of Capt. J. A. McInnis.)

Q. (Mr. DORR.) You are captain of the bark "Harriet G."? A. Yes, sir.

Q. And were you at the time the accident was supposed to have happened to the cook—you were in command at that time? A. Yes, sir.

Q. State what you know about the accident.

A. All that afternoon this Mr. Wilson he had some friends down and they were intoxicated, had lots of it. The cook was supposed to be in the galley on duty, but he did not get any dinner for us that day.

Q. Now, was the vessel at that time lying alongside the dock?

A. Lying alongside the dock that afternoon; we pulled away from the dock that afternoon.

Q. After you pulled out in the stream, how long was it before Wilson was taken ashore?

A. I did not go out on the ship to the buoy; I left the ship at Pier 7. McDonald was first officer and he took the ship out. I was not aboard at the time of the accident.

Q. How long after the ship left the dock did she sail? A. The 23d, I think.

Q. Do you remember how many days it was after he was taken ashore, were you delayed any?

A. He was taken ashore that night that he got hurt. [51]

Q. Did you sail that night?

A. No. We did not sail until the 23d.

Q. I will ask you Captain if this is the log-book of the "Harriet G."? A. Yes, sir.

Q. That is the official log? A. Yes, sir.

(Testimony of Capt. J. A. McInnis.)

Q. Were these entries in there made by you, or under your direction? A. Made by me.

Q. Is there any entry in there concerning this accident? A. Yes, sir, this one here.

Q. On which page? A. On page 12.

Mr. DORR.—I offer in evidence the entry and ask that it be read into the record so that the log-book may be taken back aboard the ship by the captain.

Mr. KIEFER.—I object to that, on the ground that it is not sufficiently proven, and I want to cross-examine before it is offered.

Q. (Mr. KIEFER.) When was that entry made?

A. It was made on that date, the 21st, the day of the accident.

Q. Did you personally make that entry?

A. Yes, sir.

Q. When did you last see Wilson that day?

A. I have never seen Wilson since.

Q. When did you last see him on that day before the accident? A. I saw him that forenoon.

Q. About what time? [52]

A. About the time they pulled away from the dock, that would be in the afternoon.

Q. A moment ago you said in the forenoon. Now was it in the forenoon or afternoon?

A. It was afternoon that we pulled away from the dock.

Q. You said you were not aboard when she pulled away from the dock.

A. I was aboard but came ashore when they hauled her out to the buoy.

(Testimony of Capt. J. A. McInnis.)

Q. You left the ship before she hauled out?

A. Yes, sir, I was on the dock.

Q. Now, are you certain that Wilson was drunk?

A. Well, he was drunk, at the time that the boat was pulled out.

Q. He was. A. Yes, sir.

Q. Who cooked dinner that day?

A. Well, I did not get any dinner.

Q. Was dinner cooked and served on board the boat that day? A. Not to my knowledge.

Q. The noon meal, was there a noon meal served?

A. I did not get any.

Q. You do not know whether there was one served or not? A. Not to my knowledge.

Q. How many hands were aboard?

A. I could not say how many were aboard.

Q. About how many? You ought to know, as master.

A. Well, at that exact date I could not say how many, but I think there was at least—I would not say; I do not know how many, because we got some of the crew from shore [53] afterwards; some were longshoremen.

Q. You had at least a dozen men aboard that day?

A. Some were longshoremen.

Q. I mean aboard of the crew, you know longshoremen are not the crew. A. No.

Q. You had ten or a dozen of the crew aboard that morning? A. I would not say; I do not know.

Q. You were not there when he was hurt?

A. I did not see him get hurt; no, sir.

(Testimony of Capt. J. A. McInnis.)

Q. Never saw him since he was hurt?

A. Never saw him since.

Q. Now, in writing that entry of the log up about this matter you based it on information that you got from other people? A. No, sir.

Q. (Mr. DORR.) You know personally that he was drunk at that time, Captain?

A. He was drunk before that log was entered.

Q. Did he bring a quantity of liquor aboard or what did he do?

A. Well, to my knowledge he had a five gallon keg and a case, I supposed it was his.

Q. Did you take it away from him?

A. I took it away from him.

Q. (Mr. KIEFER.) What did you do with it?

A. I stowed it away.

Q. Took it away and locked it up at that time?

A. In my care.

Q. You took it away and put it where he could not get it? [54]

A. He could not get it.

Q. When did you do that?

A. I done that that same day.

Q. What time of day?

A. Well, I would not say what time of day; it was through the day in the forenoon.

Q. And you made no objection to his bringing it aboard? A. I did not see it come aboard at all.

Q. You knew he was going to bring it aboard?

A. No, sir.

Q. You and he were old acquaintances?

(Testimony of Capt. J. A. McInnis.)

A. No, sir.

Q. Had he never sailed with you before?

A. The first time I ever met the gentleman was on the Swiftsure Bank, on the light-ship. I met him there once.

Q. Don't you know that Wilson is not a drinking man?

A. Well, if he is not he changed. I never seen him drink before to my knowledge. I never met him many times before. But he certainly was intoxicated with liquor then.

Q. He could get about all right, could he not?

A. Well, I don't know how drunk he was; I would not say.

Q. You do not know whether he was not able to get about? A. Well, he could not walk, hardly.

Q. Could not walk? A. Hardly.

(Testimony of witness closed.) [55]

[Testimony of A. McDonald, for Respondent.]

A. McDONALD, a witness called on behalf of the respondent, being duly sworn, testified as follows:

Q. (Mr. DORR.) You were mate of the "Harriet G." at the time of this accident? A. Yes, sir.

Q. You have heard the testimony of the captain. Now, state what you know of your own knowledge about it, the condition of the cook and anything that happened there.

A. Well, I remember everything except the dates. I could not state the dates without looking it up in my log aboard.

Q. We have fixed the dates.

(Testimony of A. McDonald.)

A. We left the dock about three o'clock in the afternoon, as near as I can remember, and when we were halfway out to the buoy somebody sung out to me that Wilson had hurt himself. I went as soon as I could to have a look at him, and he said his shoulder was dislocated. I asked him how he got that, and he said he fell on the deckload, slipped. And there was a gas boat going by and I hailed her and he came alongside and we sent him ashore immediately.

Q. What do you know about his condition at that time?

A. Well, he was what you would call half drunk.

Q. He had been drinking?

A. Yes, he had been drinking all day.

Q. Now, you signed this statement in the log-book here, did you? A. Yes, sir.

Q. Do you know when that was made?

A. Well, it was made when the captain came aboard.

Q. The same day?

A. Yes, I reported to the captain. [56]

Q. It was made the same day?

A. I think so. As soon as I seen the captain I reported everything to him and he entered it in the log.

Cross-examination.

Q. (Mr. KIEFER.) Prior to the time that Wilson got hurt you did not notice his condition at all?

A. Yes, I did.

Q. He got dinner that day, didn't he? A. No.

Q. Did not the crew have anything to eat at noon?

(Testimony of A. McDonald.)

A. No.

Q. What?

A. Oh, they might have had coffee. Had a pot of coffee in the galley; he did not serve no table.

Q. He did not set any table? A. No.

Q. Things went on that day the same as they had the day before?

A. He was drunk the day before, too.

Q. You had the same meals?

A. We were getting our meals ashore.

Q. All of them? A. Yes.

Q. Did not he cook breakfast that morning?

A. No.

Q. Well, that was because he was not cooking anything; it was not because he was drunk; there was not anything being cooked aboard.

A. There was not?

Q. Yes. [57]

A. Well, there is quite a lot there yet.

Q. I mean on these days. There was not anything being cooked aboard during these days?

A. There was nothing cooked, but everything was ready to cook, but he did not cook it. I sent one man in to help him, thinking he would get some kind of a meal up for us that day, and some of the men were short of money, but he did not give it to them. I sent a man down to him beside the waiter; he had a regular waiter, and I sent an extra man down.

Q. You did not pay any attention to his condition that day until he was hurt, did you?

A. No, only I seen him slopping around.

(Testimony of A. McDonald.)

Q. He would walk all right?

A. Oh, he could waddle around some.

Q. You did not consider his condition serious at all until he was hurt?

A. No, I thought he would sober up after we got out at sea and took the whiskey away from him.

Q. He had not gotten any whiskey since early that forenoon? You knew the captain took the whiskey away from him that morning, don't you?

A. No, I don't know that he did, but he had whiskey in the galley; he had whiskey when he got hurt.

Q. You gave him some after he got hurt?

A. I did not.

Q. Somebody else gave him some after he got hurt? A. I do not know.

(Witness excused from the stand.) [58]

[Testimony of A. Walters, for Respondent.]

A. WALTERS, a witness called on behalf of the respondent, being duly sworn, testified as follows:

Q. (Mr. DORR.) You were a seaman on the "Harriet G." at the time of this accident?

A. Yes, sir.

Q. State what you know about it.

A. Well, I do not know a great deal, only at the time I was on the fore-castle-head handling the lines, doing work that had to be done, and after they left the dock and got away out I was going aft for some purpose, I was working, seeing that the lines were hauled in and saw him, and I heard a commotion at the galley and I thought I would go and see and I asked him what was the matter and he said he had

(Testimony of A. Walters.)

dislocated his shoulder. He was crying around and hollering and yelling and I looked in the galley door and asked what was the matter, and he said he had dislocated his shoulder, and he was hollering and he was in great pain, it seemed. So I could not stay there. We got out to the buoy and made fast and as soon as a launch could be secured he was sent ashore.

Q. Now, what do you know about his condition, whether he was drunk or sober?

A. Whether he had liquor aboard or not I could not say, because I did not live aboard until that day, I was living ashore until that day that we signed on and moved aboard. But I know, of course, that he was somewhat under the influence of liquor, that I could notice on the man. But as far as cooking, I did not eat aboard until supper time. Then the mess boy put up some kind of a meal for us for supper. I did not eat nothing aboard before that, we were supposed [59] to have dinner, but there was no dinner served at that time.

Q. Had he had anything to drink so that it was noticeable?

A. Well, it seemed so, of course, the way the man acted it seemed most probable that he had some drinks. I did not see any liquor.

Q. You signed this statement in the log?

A. Yes, sir.

Q. That is your signature to the log?

A. Yes, sir.

Q. And that is the truth, as stated in the log here, is it? A. Yes, sir.

(Testimony of A. Walters.)

Cross-examination.

Q. (Mr. KIEFER.) Mr. Walters, did you notice anything peculiar about his condition before he was hurt?

A. That he was jolly, that was all, and waving at people, I understand, at the time the accident happened, I did not see it, that is what I was told, he was waving at the people.

Q. Had you seen him around the ship before the accident happened? A. Yes, sir.

Q. And you had not noticed his condition, his condition had not attracted your attention at all?

A. No.

Q. He got around all right?

A. Well, as far as that goes; he was in the galley whenever I saw him. [60]

Q. In there at work?

A. Well, whatever work he had, he did not cook nothing for us, so I do not know what he was doing, to tell the truth.

Q. You saw him around the ship before the accident? A. Yes, sir.

Q. His condition was not such as to attract the attention, was it? A. Not until we were out.

Q. Not until he was hurt? A. Yes.

Redirect Examination.

Q. (Mr. DORR.) Do you mean to say you did not notice that he was drunk?

A. I told you when I seen him, when we went out, he was acting as a man that might have had some

(Testimony of A. Walters.)

liquor; he was waving and hollering; that is all I seen.

Q. That was before the accident?

A. That was as we were leaving the dock before that I did not pay much attention, I was at my work. I did not eat aboard, I did not know nothing about the man.

Mr. DORR.—I desire to read page 12 of the log-book of the “Harriet G.,” under date of April 23, 4 P. M. Under the heading occurrences: “Hauled out from pier 7 in tow of tug ‘Mystic.’ As the vessel was clear of the wharf, J. J. Wilson, the ship’s cook, fell on deck and claimed to be hurt seriously. He was sent ashore to the hospital at his own request. At the time he fell he was drunk. Witnesses: Alex. McDonald, Mate. [61] James Muir, seaman. ——— Downie, seaman. A. Walters, seaman.”

Mr. KIEFER.—I desire it noted in the record that the log shows an extremely clean condition and the fact that there is no further entry in it, that is the only entry in this log.

Q. (Mr. KIEFER.) Captain Innis, are these all the entries required by law to be made by you?

A. The log-book aboard the ship is kept by the first officer.

Mr. KIEFER.—I want the Commissioner to note the extreme clean and unused condition it is in.

Mr. DORR.—On page 5, we have a list of the crew and report of the character. And on page 12 we

have an entry of a man deserting, witnessed by Alex. McDonald.

(Witness excused.) [62]

**[Testimony of Alex. McDonald, for Respondent
(Recalled).]**

ALEX. McDONALD, recalled for further

Cross-examination.

Q. (Mr. KIEFER.) How soon was Wilson taken off the boat after he was injured?

A. I could not tell you in so many minutes. It would not take us very long after we left the wharf until we got to the buoy. As we were fast to the buoy I sent a fellow to help Wilson over into a launch; I could not be there myself, because I had to be looking after making fast.

Q. Was not more than half an hour?

A. I don't think it could be any more.

Q. Mr. McDonald, had the steps leading from the poop-deck down to the break of the poop been removed to make room for the deckload?

A. We had a full deckload.

Q. Had these steps that were there been removed?

A. From the top of the house? No.

Q. Perhaps you do not understand me. The steps at the break of the poop where Wilson fell, had the steps been removed? A. No.

Q. In coming down from these steps a man had to step on the deckload, from where Wilson had been to step on the deck?

A. He came down off the top of the house, the

(Testimony of Alex. McDonald.)

steps came down from the house to the half deck, and from that deck again to the main deck, and the steps down here, from the half deck down, the steps were there, but the cargo was around.

Q. A man going down there had to step on the deckload, [63] the timbers?

A. There was only a step there.

Q. When he got down he had to step on the deckload of timbers?

A. There was one step from the half deck to the deck.

Q. (Mr. DORR.) What Mr. Kiefer wants to know is, whether they had been removed.

A. No, they had not been removed, but they were covered in with cargo.

Q. (Mr. KIEFER.) What was that cargo?

A. Timbers and lumber.

Q. That is where he slipped and fell? A. Yes.

Q. (Mr. DORR.) Was that where he slipped and fell?

A. I did not see him fall at all; but there is a man aboard the ship that seen him fall.

Q. (Mr. KIEFER.) Your voyage has just ended, you just got back on the 5th or 6th?

A. Whenever I signed clear.

Q. That was within the last couple of days?

A. Yes.

Q. You arrived on Sunday? A. Yes, sir.

Q. And signed off Monday or Tuesday?

A. Paid off Monday.

(Testimony of witness closed.) [64]

Seattle, Washington, October 8, 1913.

Present: Mr. KIEFER, for the Libelant.

Mr. DORR, for the Respondent.

Further Testimony on Behalf of Libelant.

[Testimony of Dr. J. E. Godfrey, for Libelant.]

Dr. J. E. GODFREY, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. KIEFER.) Doctor, do you reside in the city? A. Yes, sir.

Q. You are a practicing physician? A. I am.

Q. Were you connected with Providence Hospital staff in April last? A. I was.

Q. Did you on the 23d of April attend J. W. Wilson? A. I did.

Q. He is a big, stout man?

A. A very fat man.

Q. What did you find his physical condition to be when you attended him?

A. His physical condition was pretty good. He had a dislocated shoulder. I cannot tell you offhand whether right or left shoulder, but I think it was his right. I have it in my notes at the house but did not have an opportunity to get them after I was notified to be here, but his shoulder was drooping and flat and dislocated.

Q. The usual conditions of an injury of that character? A. Yes, sir. [65]

Q. Now, I will ask you, Doctor, whether you attended him and fixed up his injuries?

A. We gave him an anaesthetic on the bed in the ward, in the presence of the other patients of the

(Testimony of Dr. J. E. Godfrey.)

ward and the ward steward was with me at the time, and I put his shoulder back in place, and I think a day or two after we had an X-ray picture taken, which I have at the hospital.

Q. What was the nature of the injury, was it a serious dislocation, or was there a fracture accompanying it?

A. There was evidently no fracture, but there was a separation of the clavicle and the scapula, that is the collar-bone and the shoulder blade. There was not any fracture evident in the picture.

Q. When did you last see him after that?

A. I could not tell you the definite date, but it was a month or six weeks after that.

Q. It was June sometime? A. I think so.

Q. Now, what was his condition at that time, was he able to work?

A. Well, he was complaining of pain in the shoulder, though he had good movement.

Q. He was a man pretty well advanced in years?

A. Pretty well.

Q. Would a man of his build and age recover as rapidly from an injury of that character as a younger and lighter man?

A. No, I think not. He was a fat, flabby man.

Q. Now, Doctor, what was his condition when you attended him [66] as to being drunk or sober?

A. His condition when I found him, he was perfectly rational, answered all questions to me distinctly, how the accident happened. That, I think he was standing on the deck, as near as I can give it

{Testimony of Dr. J. E. Godfrey.)

from memory, and that he fell in some way—

Q. You need not tell what he said, Doctor, but was he drunk or sober, in your opinion?

A. Well, he was perfectly rational, and could tell me everything, and he was not drunk, no, he was sober. He had been drinking.

Q. He had had some liquor?

A. He had had some liquor; there was the odor of liquor on his breath.

Q. If he had been given a stimulant after the accident would that account for the condition in which you found his breath?

A. Yes, surely, liquor at any time, before or after.

Q. Doctor, what was your charge for these services? A. Fifty dollars.

Q. That has not been paid?

A. That has not been paid.

Cross-examination.

Q. (Mr. DORR.) What time of day was it, Doctor, that you called upon him?

A. I think it was perhaps half-past nine or ten at night.

Q. Was the odor of liquor very apparent or scarcely noticeable?

A. I knew he had had some liquor, it was apparent enough [67] for that. We knew he had had some but he was not apparently the worse for liquor.

Q. In your opinion, more than would have resulted from a single drink? What is your idea about that?

A. Well, a single drink would give the odor on his breath I do not know how many drinks he had,

(Testimony of Dr. J. E. Godfrey.)

that is a pretty hard thing to say, but at the same time he was perfectly rational.

Q. He was not under the influence at all?

A. No. He was sitting there quietly and was not acting up or anything, and did not act as a drunken man would act, that was at the time I saw him.

(Testimony of witness closed.)

Hearing adjourned. [68]

**[Certificate of U. S. Commissioner to Transcript of
Testimony.]**

United States of America,
Western District of Washington,
Northern Division,
Seattle, Washington,—ss.

I, A. C. Bowman, a Commissioner of the United States District Court for the Western District of Washington, do hereby certify that the foregoing transcript, from page 1 to page 46, both inclusive, together with the exhibits returned herewith, contains all of the testimony offered by the parties before me on the dates indicated in said transcript.

The several witnesses, before examination, were duly sworn to testify the truth, the whole truth and nothing but the truth.

I reduced the testimony to writing in shorthand and thereafter caused the same to be typewritten.

Proctors for the parties stipulated waiving the reading and signing of the testimony by the several witnesses, agreeing that said testimony when returned by me into court should have the same force and effect as if read and signed by them.

I further certify that I am not of counsel nor in any way interested in the event of this suit.

Witness my hand and official seal this 10th day of November, 1913.

[Seal]

A. C. BOWMAN,
U. S. Commissioner. [69]

COMMISSIONER'S TAXABLE COSTS:

Libelant:

Hearings for Libelant May 23, June 20, October 8, 1913.....	9.00
Administering oaths to 8 witnesses.....	.80
Marking and filing 1 exhibit.....	.10
Transcript above hearings, 85 folios at 10c..	8.50
1½ fees preparing and making findings (\$6).	3.00
	<hr/>
	\$21.40

Claimant:

Hearing for Respondent Oct. 8, 1913.....	3.00
Administering oaths to 3 witnesses.....	.30
Marking and filing 1 exhibit.....	.10
Transcript above hearing 40 folios at 10c..	4.00
1½ fees preparing and making findings (\$6).	3.00
	<hr/>
	\$10.40

[Indorsed]: Testimony Reported by U. S. Commissioner. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 4, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [70]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING COMPANY,

Respondent.

Order to Transmit Original Exhibits.

Now, on this 4th day of February, 1914, upon motion of Messrs. Dorr & Hadley, proctors for appellant, and for sufficient cause appearing, it is ordered that the Libelant's Exhibit "A" and Respondent's Exhibit "A," filed and introduced as evidence upon the trial of this cause, be, by the Clerk of this Court, forwarded to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, there to be inspected and considered, together with the apostles on appeal in this cause.

JEREMIAH NETERER,

District Judge. [71]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING COMPANY,

Respondent.

Findings of Fact and Conclusions of Law [of U. S. Commissioner].

To the Honorable Judges of the Above-entitled Court:

This action is brought by the libelant to recover wages as seaman on board the brig "Harriet G.," and for hospital service and medical attendance after an injury occurred to him on board, against the respondent, the owner of the "Harriet G."

The respondent in its amended answer denies the performance of service as seaman by libelant, and for affirmative defense alleges that the contract entered into between the libelant and the master of the brig, evidenced by shipping articles, had been violated by the libelant before commencement of the voyage, and asks that the libel be dismissed.

The Shipping Articles provide, among other things, that "No dangerous weapons or grog allowed, and none to be brought on board by the crew." The respondent claims that the libelant violated the contract by bringing liquor on board the brig.

It is further claimed by the respondent that the voyage had not begun at the time of the accident to libelant.

The undisputed testimony shows that the libelant was employed as cook on board the brig "Harriet G.," at eighty dollars per month, for a voyage from Seattle, Washington, to [72] Port Heiden, Alaska, and return, not exceeding six months. That the shipping articles required by law were signed by the libelant on the 21st day of April, 1913. That on the 23d

day of April, 1913, at about 2 o'clock P. M., the brig, in tow of a tug, left the dock in the port of Seattle, and was towed to a buoy in the bay, the vessel having completed loading prior to that time. That after the vessel left the dock in tow of the tug, the libelant in passing from the aft part of the vessel to go forward to the galley, sustained the injury complained of in the libel.

The testimony shows that the companionway or steps leading from the half deck to the main deck had either been removed or covered with deckload consisting of piles which had been placed on the main deck. The testimony also shows that the libelant knew, in the forenoon of the day on which the accident occurred, that the main deck at that part of the vessel, had been loaded with piles; but had forgotten that fact and attempted to use the steps in the usual manner; and, realizing the changed condition too late to stop, grasped a line or stay with his left hand to break his fall. It also appears from the testimony that the libelant is about fifty-nine years of age and at the time of the accident weighed about three hundred pounds, and, in his effort to save himself from falling, dislocated his left shoulder. An officer of the ship being advised of the accident, as soon as the vessel came alongside the buoy procured a launch and sent an officer ashore with the libelant, and caused the libelant to be taken to Providence Hospital for treatment. The evidence further shows that the master did not furnish the libelant a certificate entitling him to the service of a marine doctor. [73]

The evidence further shows that the libelant, prior

to the time of the accident, had purchased a quantity of liquor, a case at least, and had brought the same on board the vessel, but upon its discovery by the master of the vessel on the forenoon of the day on which the accident occurred, it was taken by the master out of the possession of the libelant.

The testimony of the witnesses for the respondent is directed to the point that the libelant was intoxicated prior to and at the time of the accident. This is denied by the libelant and his witnesses. From the testimony I am unable to conclude that the libelant was in such a condition as to warrant me in finding that the accident was due to intoxication, or to be sufficiently under the influence of liquor as to justify the respondent in claiming the right to rescind the contract of shipment for that reason. As to the particular violation of the articles complained of, the bringing of intoxicating liquor on board the vessel, no breach of contract was claimed at the time of the discovery of the liquor, and apparently this violation of the contract was treated as simply a breach of discipline by the master; for, there is no evidence in the record to show that the liquor was returned to the shore or disposed of in other than the usual way.

After the signing of the shipping articles on the 21st of April, 1913, the contract as between the libelant and the master of the vessel was in force, and the libelant was subject to whatever discipline the master saw fit to enforce, and the contention of the respondent that the voyage had not begun at the time of the accident, seems to me, under the circum-

stances, to be unavailable.

The claim of the libelant for maintenance during the [74] period of recovery, is not supported by sufficient definite proof to enable me to make a finding thereon.

There is no dispute as to the amount due for hospital service or for medical attendance. For hospital service I find there is \$30.60, and for medical attendance, \$50, due.

It is contended by the respondent that if any liability attaches to it, that under section 4527, R. S., only one month's pay should be awarded the libelant beyond the hospital service and medical attendance.

After considering the testimony offered, and the argument of counsel as to the law applicable to this particular case, I find that the libelant is entitled to wages at eighty dollars per month until the end of the voyage, to wit: From April 21st, 1913, to October 5th, 1913, amounting to \$440; \$30.60 for hospital service and \$50 for medical attendance. That a decree should be entered in his favor against the respondent in the sum of \$520.60, together with his costs and disbursements herein.

Dec. 2, 1913.

Respectfully submitted,

A. C. BOWMAN,

U. S. Commissioner.

[Indorsed]: Findings of U. S. Commissioner. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 4, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.
[75]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING COMPANY, a Corpo-
ration,

Respondent.

**Exceptions of Respondent to Findings of Fact and
Conclusions of Law of Commissioner.**

To the Honorable Judges of the Above-entitled
Court:

The respondent, by Dorr & Hadley, its proctors,
excepts to the findings of fact and conclusions of law
filed herein by the United States Commissioner, as
follows:

I.

Respondent excepts to the allowance of wages to
libelant at \$80 per month from April 21st, 1913, to
October 5th, 1913, amounting to \$440, the same being
contrary to the law and the evidence.

II.

Respondent excepts to the allowance to libelant of
\$30.60 for hospital service and \$50 for medical at-
tendance, the same being contrary to the law and the
evidence. [76]

III.

Respondent excepts to the conclusion that a decree

should be entered in favor of libelant and against respondent in the sum of \$520.60 with costs, the same being contrary to the law and the evidence.

IV.

Respondent excepts to the refusal of the commissioner to find that respondent was entitled to a decree in its favor, with costs, the same being supported by the law and the evidence.

DORR & HADLEY,
Proctors for Respondent.

Service of the within Exceptions is accepted and receipt of copy admitted this 5th day of December, 1913.

JAMES KIEFER,
Proctor for Libelant.

[Indorsed]: Exceptions of Respondent to Findings of Fact and Conclusions of Law of Commissioner. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 6, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [77]

*United States District Court, Western District of
Washington, Northern Division.*

IN ADMIRALTY—No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING COMPANY,
Respondent.

Filed Jan., 1914.

[Decision] on Exceptions to Findings and Conclusions of Commissioner.

JAMES KIEFER, for Libellant.

DORR & HADLEY, for Respondent.

NETERER, District Judge.

The libellant commenced this action to recover wages as seaman on board the brig "Harriet G.," and for hospital expenses and medical attendance in effecting a cure for the injury received on board. Respondent denies performance of services as seaman, denies all liability, and further alleges that libellant had violated conditions of the shipping articles and was discharged before the voyage began. The provision of the shipping articles alleged to have been violated is as follows:

"No grog allowed, and none to be brought on board by the crew."

Libellant took on board a five-gallon cask of whiskey which was taken possession of by the master, the seal of which was unbroken. No breach of contract was asserted at the time by the respondent, nor was anything done other than the taking possession of the whiskey by the master, and the matter was treated as a breach of discipline. The testimony is conclusive that libellant was employed as cook on board the brig "Harriet G." [78] at \$80 per month, for a voyage from Seattle, Washington, to Port Heiden, Alaska, and return, not exceeding six months. The shipping articles were signed by the libellant on the 21st day of April, 1913. On the 23d

day of April, 1913, about two o'clock P. M., the brig in tow of a tug left the dock in the port of Seattle and was towed to a buoy in the bay, the vessel having been fully loaded. After the vessel left the dock libellant in passing from the aft part of the vessel to go forward to the galley sustained the injury. An officer of the ship being advised of the accident, procured a launch and sent libellant ashore, and caused him to be taken to Providence Hospital for treatment. The master did not furnish libellant a certificate entitling him to the services of a marine doctor.

An examination of the testimony convinces me that libellant was not in an intoxicated condition; that nothing was said to libellant at the time, nor anything done with relation thereto. There was no conduct on the part of libellant disclosed by the testimony which in any way disqualified him from performing his duties, and the master would not have been justified in discharging him.

Villa vs. Herman, 101 Fed. 132.

Did the voyage commence when the brig pulled away from the dock and proceeded to the buoy on the afternoon of April 23d, or did it not commence until the 25th when it left the buoy and proceeded directly on its voyage? Garver's *Carriage by Sea* (5th Ed.), sec. 148, states the rule to be that if a vessel is lying at her port loading and has to move from the place at which she is lying to go to a loading berth, the "voyage" commences as soon as she breaks ground to go to that berth. Reason would suggest that a voyage at least could be said to commence when a vessel leaves her moorings, loaded, and proceeds out

into the open water, even though she might anchor at the buoy for several days. The Supreme Court of Massachusetts in *Bowen vs. Hope Insurance* [79] Co., 37 Mass. 275, 32 Am. Dec. 213, lays down the rule that a voyage is begun when the vessel leaves her moorings, proceeds down the stream, and goes to an anchorage to lie for favorable winds.

“That the vessel has moved on the prosecution of the voyage, whether in the sea, or an arm of the sea, whether in a river or a canal communicating with the sea, enables us to say she is on her passage, and exposed to the perils of such passage. This vessel had sailed within the case of *Bond vs. Nutt* (Cowp. 601, 607). Lord Mansfield there mentions a ship as having commenced her voyage, though she had barely begun to sail, and was stopped by an embargo. . . . In short, the least locomotion with readiness of equipment and clearance satisfies a warranty to sail. *Pettigrew vs. Pringle*, 3 Barn. & Adolph. 514.”

Union Insurance Co. vs. Tysen, 3 Hill (N. Y.), 118;

Cochrane vs. Fisher, 1 Crompt., Mees. & Rose. 809.

There is no testimony in this case that libellant was discharged. His employment was admitted. The testimony shows that he had worked at least two days. Sec. 4529, Revised Statutes, provides:

“The master . . . shall pay to every seaman his wages . . . at the time of his discharge.”

No wages were paid libellant, nor anything done with relation to discharge other than taking libellant ashore and employing another cook. The employment of a cook was necessary. The libellant was incapacitated by the injury and a duty devolved upon the respondent to effect his cure, and pay his wages to the end of the voyage.

The *Osceola*, 189 U. S. 158;

The *New York*, 204 Fed. 764;

The *City of Alexandria*, 17 Fed. 390;

The *Fullerton*, 167 Fed. 1;

The *Nyack*, 199 Fed. 383.

The contention that Sec. 4527, Rev. St., applies to this case, and that libellant cannot in any event recover more than one month's wages under the findings upon the facts cannot be sustained. This section provides: [80]

“Any seaman who has signed an agreement and is afterwards discharged before the commencement of the voyage, or before one month's wages are earned, shall be entitled to receive from the master . . . in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation.”

The voyage having commenced, and libellant not having been discharged, this section has no application.

The *Staghound* and the *Game Cock*, 97 Fed. 973; *St. Paul*, 77 Fed. 998; and *Raymond vs. The Ella S. Thayer*, 40 Fed. 902, are readily distinguished.

There is no dispute as to the expenses incurred in

effecting a cure, to wit, \$30.60 for hospital service, and \$50 for medical attendance.

I think that the report of the Commissioner in finding that libellant is entitled to recover his wages from April 21, 1913, to October 5, 1913, to wit, \$440 and \$80.60 for hospital and medical attendance, a total of \$520, should be sustained.

A decree may be entered accordingly.

JEREMIAH NETERER,

Judge.

[Indorsed]: Court's Decision on Exceptions to Findings and Conclusions of Commissioner. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 16, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [81]

In the District Court of the United States in and for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2477.

J. W. WILSON,

Libellant,

vs.

MANHATTAN CANNING COMPANY,

Respondent.

Decree.

In this cause the findings and conclusions of the Commissioner having been filed, finding for the libellant in the sum of \$520.00 and costs, and the libellant having excepted thereto and the respondent having

excepted thereto, the matter came on for final hearing and argument before the court on December 31, 1913, and the Court having heard the argument of proctors for the parties, and having taken the cause under advisement, did on January 1, 1914, file the decision and opinion of the Court in writing wherein and whereby the findings and conclusions of the Commissioner were approved and confirmed.

It is now, therefore, by the Court ordered, considered, adjudged and decreed, and the Court does hereby order, consider, adjudge and decree that the libelant, J. W. Wilson, do have and recover of and from the respondent, Manhattan Canning Company, the sum of five hundred and twenty (\$520.00) dollars, together with the libelant's costs herein to be taxed upon the cause of action pleaded in the libel herein, and that unless said decree be stayed by an appeal and *supersedeas* bond according to law within ten days from this date [82] that said libelant have execution against said respondent therefor.

Done in open court January 19th, 1914.

JEREMIAH NETERER,

Judge.

Copy of within Decree received and service of same acknowledged this 17th day of January, 1914.

DORR & HADLEY,

For Respondent.

[Indorsed]: Decree. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 19, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [83]

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING COMPANY, a Corpo-
ration,

Respondent.

Notice of Appeal.

To J. W. Wilson, Libelant in the Above-entitled
Cause, and James Kiefer, Esq., His Proctor:

YOU AND EACH OF YOU will please take notice
that the Manhattan Canning Company, a corporation,
respondent in the above-entitled cause, hereby ap-
peals from a decree in favor of the libelant, made and
entered herein on January 19th, 1914, to the United
States Circuit Court of Appeals, for the Ninth Cir-
cuit.

Dated this 27th day of January, 1914.

DORR & HADLEY,
Proctors for Respondent.

[Indorsed]: Notice of Appeal. Filed in the U. S.
District Court, Western Dist. of Washington, Jan.
27, 1914. Frank L. Crosby, Clerk. By E. M. L.,
Deputy. [84]

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING COMPANY, a Corpo-
ration,

Respondent.

**Notice of Filing Notice of Appeal and Bond on Ap-
peal.**

To J. W. Wilson and to James Kiefer, Esq., His
Proctor:

YOU AND EACH OF YOU will please take no-
tice that the above-named respondent has this day
filed a notice of appeal herein and a bond, staying
execution pending said appeal, copies of which said
notice and bond are herewith served upon you.

Dated this 27th day of January, A. D. 1914.

DORR & HADLEY,

Proctors for Respondent.

Service copies of the within Notice of Appeal and
Bond on Appeal is accepted and receipt of copy ad-
mitted this 27th day of January, 1914.

JAMES KIEFER,

Attorney for Libelant.

[Indorsed]: Notice of Filing Notice of Appeal and
Bond on Appeal. Filed in the U. S. District Court,
Western Dist. of Washington, Northern Division,

Jan. 27, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [85]

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING COMPANY, a Corpo-
ration,

Respondent.

Assignments of Errors.

Now comes the Manhattan Canning Company, a corporation, respondent and appellant herein, and assigns errors in the rulings of the court and in its proceedings, orders, decisions and decrees herein, as follows, to wit:

I.

The decision of the Court and the order overruling respondent's exceptions to the libel, which said exceptions are as follows, to wit:

"1. (Exception.) Because from the allegations of the libel it appears that libelant's employment ceased before the commencement of the voyage, and that libelant is therefore not entitled to the relief claimed, to wit: wages for the entire voyage, nor is libelant entitled to wages under the allegation of the libel for any period to exceed one month"

was and is, and is here assigned as error. [86]

II.

The Court erred in refusing to find that, from the allegation of the libel, libelant was not entitled to the relief claimed, to wit, wages for the entire voyage, nor to wages for any period to exceed one month.

III.

The cause having been referred to A. C. Bowman, United States Commissioner, to take the testimony and make findings of fact and conclusions of law, and said Commissioner having found for the libelant and against the respondent in the sum of \$520 and costs, which findings and conclusions were confirmed by the Court over the exceptions of respondent, respondent and appellant here assigns, as error, the refusal of the Court to sustain the exceptions of respondent, which were and are as follows, to wit:

“I. Respondent excepts to the allowance of wages to libelant at \$80 per month from April 21st, 1913, to October 5th, 1913, amounting to \$440, the same being contrary to the law and the evidence.”

“II. Respondent excepts to the allowance to libelant of \$30.60 for hospital service and \$50 for medical attendance, the same being contrary to the law and the evidence.”

“III. Respondent excepts to the conclusion that a decree should be entered in favor of libelant and against respondent in the sum of \$520 with costs, the same being contrary to the law and the evidence.”

“IV. Respondent excepts to the refusal of the commissioner to find that respondent was en-

titled to a decree in its favor, with costs, the same being supported by the law and the evidence."

IV.

The Court erred in confirming the findings and conclusions of the United States Commissioner as aforesaid. [87]

V.

The entering of the final decree in favor of the libelant and against respondent was and is, and is here assigned as, error.

VI.

The refusal of the Court to enter a decree in this cause in favor of respondent and against libelant, was and is, and is here assigned as error.

WHEREFORE, appellant prays the judgment of the United States Circuit Court of Appeals, for the Ninth Circuit, in the premises, that the decree appealed from be reversed, and that it recover its costs herein incurred.

DORR & HADLEY,
Proctors for Respondent.

Service of the within is accepted and receipt of copy admitted this 31st day of Jan.

JAS. KIEFER,
Attorney for Libelant.

[Indorsed]: Assignments of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 30, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [88]

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING COMPANY, a Corpo-
ration,

Respondent.

Bond on Appeal Staying Execution.

KNOW ALL MEN BY THESE PRESENTS:
That the Manhattan Canning Company, a corpora-
tion duly organized and existing under the laws of
the State of Washington, as principal, and the Fidel-
ity and Deposit Company of Maryland, a duly organ-
ized bonding company, authorized to operate under
and by virtue of the laws of the State of Washington,
as surety, are held and firmly bound unto J. W. Wil-
son, his heirs, executor, administrator and assigns, in
the sum of two hundred and fifty dollars (\$250), and
in the further sum of one thousand dollars (\$1,000),
the payment of which sums, well and truly to be
made, we bind ourselves, and each of us, our and each
of our successors and assigns, jointly and severally,
firmly by these presents.

SEALED with our seals and dated this the 27th
day of January, A. D. 1914.

WHEREAS, in the above-entitled cause, a decree
was made and entered on January 19th, 1914, in
favor of the said J. W. Wilson, libelant, and against

the Manhattan Canning Company, respondent, in the sum of \$520 and costs, from which decree [89] respondent is about to appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, and desires to stay the execution of said decree during said appeal.

NOW, THEREFORE, the condition of this obligation is such that if the above-named respondent shall prosecute said appeal with effect, and pay all costs which may be awarded against it, if the appeal is not sustained, and if said respondent shall abide by and perform whatever decree may be rendered in this cause by the said United States Circuit Court of Appeals, or on the mandate of said Court, by the Court below, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

MANHATTAN CANNING COMPANY. [Seal]

By T. J. GORMAN,
President,

Attest: S. HARRINGTON,
Secretary,

Principal.

FIDELITY AND DEPOSIT COMPANY

OF MARYLAND, [Seal]

By J. A. CATHCART,
Attorney in Fact,
Surety.

Attest: A. W. WHALLEY, Agent.

Approved Jan. 27, 1914.

JEREMIAH NETERER,
Judge.

[Indorsed]: Bond on Appeal Staying Execution. Filed in the U. S. District Court, Western Dist. of Washington. Jan. 27, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [90]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING COMPANY, a Corp.,
Respondent.

Praecepta for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

You will please prepare and certify the following pleadings, exhibits, records, proceedings, testimony and papers to be used on appeal of the above cause to the United States Circuit Court of Appeals, for the Ninth Circuit:

1. Caption exhibiting the proper style of the Court and the title of the cause; and a statement showing the time of commencement of the action, the names of the parties, the several dates on which the respective pleadings were filed; the fact that the nature of the action is a libel *in personam*, and that the respondent was served with a Citation on May 19, 1913; that the cause was referred to the United States Commissioner, for the purpose of tak-

ing testimony and making findings and conclusions; that the United States Commissioner found for the libelant in the sum of \$520 and costs; that a decree was entered herein by Judge Neterer on January 19th, A. D. 1914; that a notice of appeal was filed herein on January 27, A. D. 1914.

2. All the pleadings.
3. All the testimony taken before the United States Commissioner, and exhibits. [91]
4. Findings and Conclusions of the United States Commissioner.
5. Exceptions of Respondent to Findings and Conclusions of Commissioner.
6. Opinion of Judge Cushman on Exceptions to Libel and Opinion of Judge Neterer on Exceptions to Findings and Conclusions of Commissioner.
7. Final Decree, and Notice of Appeal, and Notice of filing and serving thereof.
8. Assignments of Error.
9. Bond on Appeal.

Dated this 31st day of January, A. D. 1914.

DORR & HADLEY,
Proctors for Respondent.

[Indorsed]: Praecipe for Apostles on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Feb. 2, 1914. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy.
[92]

[Certificate of Clerk U. S. District Court to
Apostles.]

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

No. 2477.

J. W. WILSON,

Libellant,

vs.

MANHATTAN CANNING COMPANY,

Defendant.

United States of America,

Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States, for the Western District of Washington, do hereby certify the foregoing 92 typewritten pages, numbered from 1 to 92, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the record on appeal to the said Circuit Court of Appeals for the Ninth Circuit from the District Court of the United States for the Western District of Washington.

I further certify the following to be a full, true

and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the respondent and appellant for the preparation and certification of the typewritten record on appeal issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S., as Amended by Sec. 6, Act of March 2, 1905), for making transcript of the record for printing purposes; 230 folios at 30c per folio.....	\$69.00
Certificate to certified copy of typewritten transcript of record.....	.30
Seal to said certificate.....	.40
Certificate to original exhibits.....	.30
Seal to said certificate.....	.40
	<hr/>
	\$70.40

I hereby certify that the above cost for preparing and certifying record, amounting to \$70.40, has been paid to me by Messrs. Dorr & Hadley, counsel for respondent and appellant.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 5th day of February, 1914.

[Seal]

FRANK L. CROSBY,
Clerk.

[Endorsed]: No. 2377. United States Circuit Court of Appeals for the Ninth Circuit. Manhattan Canning Company, a Corporation, Appellant, vs. J. W. Wilson, Appellee. Apostles. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Received and filed February 9, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Certificate of Clerk U. S. District Court to Original Exhibits.]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2477.

J. W. WILSON,

Libelant,

vs.

MANHATTAN CANNING COMPANY, a Corporation,

Respondent.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that the hereto attached sealed package contains the original exhibits intro-

duced and used upon the hearing and trial of the above-entitled cause, as follows:

Libelant's Exhibit "A" and Respondent's Exhibit
"A "

which said original exhibits are herewith transmitted to the Circuit Court of Appeals, there to be inspected and considered together with the transcript of the record on appeal in the above-entitled cause; which said exhibits are so transmitted pursuant to the Order of the said District Court so directing, a copy of which said order will be found on page 71 of the record on appeal in said above-entitled cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, at Seattle, in said District, this 5th day of February, 1913.

[Seal]

FRANK L. CROSBY,

Clerk.

[Libelant's Exhibit "A"—Hospital Bill.]

Seattle, Wash., May 5, 1913.

Mr. J. W. Wilson,

To Sisters of Charity, Dr.

PROVIDENCE HOSPITAL.

Amount

To 12 day's board and attendance from Apr.

23 to May 5, 1913, at \$12.00 per week..... 20.60

Use of operating room.....

Use of X-Ray..... 10.00

Medicines and Dressings 30.60

Liquors.....

Dr. Godfrey..... 50.00

Received Payment.

[Endorsed]: Libelant's Ex. "A." No. 2477. United States District Court, Western District of Washington, Northern Division. J. W. Wilson, Libellant, vs. Manhattan Canning Co., Respondent. Filed June 20, 1913. A. C. Bowman. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 4, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

No. 2377. U. S. Circuit Court of Appeals for the Ninth Circuit. Libelant's Exhibit "A." Received Feb. 9, 1914. F. D. Monckton, Clerk.

Form 705B

Department of Commerce and Labor
BUREAU OF NAVIGATION
SHIPPING SERVICE

Notice to master of a merchant vessel of the United States (signatures) to be placed or posted up in such place; that Section 10 of the Act of June 26, 1884, as amended, requires that advance wages to seamen shipping in ports of the U.S.

CHAMBERLAIN,
Commissioner of Navigation.

SEC. 10. a. To pay such advance wages to any other person. Any person paying such wages so advanced, and may also be imprisoned for a period not exceeding the master or owner thereof from full payment of wages after the same receive, either directly or indirectly, from any seaman or other person such offense be deemed guilty of a misdemeanor, and shall be imprisoned.

(b) That it shall be the duty of the master, parents, wife, sister, or children. But no allotment whatever shall be made to the master or owner thereof from the Dominion of Canada, Newfoundland, the West Indies and the Bermudas. And if any person enters himself as a seaman, he shall be deemed to have agreed that if any member of the crew considers himself to be aggrieved by the master, who shall thereupon take such steps as the case may require.

It is the duty of the master to refer the crew to the consular agent, and to the foregoing scale. And it is hereby agreed, that if any member of the crew considers himself to be aggrieved by the master, who shall thereupon take such steps as the case may require.

Crew to be referred

cargoes and

the Master

The authority of the master is hereby declared to be the same as the authority of the master, and the master is hereby declared to be the same as the authority of the master, and the master is hereby declared to be the same as the authority of the master.

Master, on the day

This is to be signed

VOYAGE.

DATE OF COMMENCEMENT OF VOYAGE. I declare to the truth of the entries in this and account of crew, etc.

, Master.

1. Here the voyage is to terminate.
2. If these words are used, the master must use a sufficiently large form is used. If more men are used.
3. Sec. 4608, R. S., p. 10.
4. Here any other statement.

Any Erasure, Inconsistency, or other defect, to be made with the consent of the Consular Agent, to be made with the consent of the Consular Agent.

Commission of Subscription.

Vessels engaged in the whaling or fishing business are not covered by the above provision of law or by the regulations below regarding scale of produce.

ARTICLES OF AGREEMENT BETWEEN MASTER AND SEAMEN IN THE MERCHANT SERVICE OF THE UNITED STATES.

Require that let f cover $\{t, t+1\}$, R used statute of the f and $t+1$.

Office of the U. S. Shipping Commissioner for the Port of Portland, Wash. APR 21 1912

IT IS AGREED between the Master and seamen, or mariners, of the *Reg. Harriet B*
of Port Townsend, Wash. *J. A. Mc*

at present Master, or a master shall go for Master now coming from (the Port of) Seattle, Wash. to

Port Heiden, Alaska

Alaska

and such other ports and places in any part of ~~the world~~ as the Master may direct, and back to a port of discharge in the United States, for a term of time not exceeding _____ calendar months.

GOING ON SHORE IN FOREIGN PORTS IS PROHIBITED EXCEPT BY PERMISSION OF THE MASTER

NO DANGEROUS WEAPONS OR GROC ALLOWED AND NONE TO BE BROUGHT ON BOARD BY THE CREW

SCALE () PROVISIONS to be allowed and served out to the crew during the voyage in addition to the daily ration of food and drink per man, per day, or other to obtain a supply case required by law.

SUBSTITUTES

The foregoing rule of previous shall be inserted in every article of agreement and shall not be reduced by any contract except as it is reduced by any at the same time. It is to be in a conspicuous place in the gallery and in the fore part of each vessel.

It is also agreed that

Crew to load and discharge all cargoes and ballast if required by the Master

The fishermen's contract hereto attached is hereby referred to and made part of these shipping articles.

Voyage to be ended, only when decks are cleared and vessel safely moored at dock of next loading port.

The entry of the Owner's Agent in the following
is intended with a view to ~~promote~~ protection

IV WITNESSES WHEREOF the said parties have subscribed their names on the other side
or sides hereof on the days against their respective signatures mentioned

Signed by J. A. M^c James

, Master, on the day

APR 21 1913

TO ALL THE WHOM THESE COME, GREETING

I hereby declare to the truth of the entries in this Agreement and account of crow etc.

Seattle Wash.

Any person who publishes or circulates, or attempts to publish or circulate, any such material shall be guilty of a misdemeanor.

Plaintiffs "A"

No. 2477

United States District Court
Western District of Washington.
NORTHERN DIVISION.

G. W. Wilson

Libellant.

vs.
Manhattan Commerc.
Co.

Respondent

Filed July 20, 1913.

A. C. Bowman
U.S. Comm.

89

Or Indorsements made by Shipping Commissioners and Consuls.

CERTIFICATES

FILED IN THE
U.S. District Court
Western Dist. of Washington,
NORTHERN DIVISION

DEC. 4 1913

~~FRANK L. CROSBY~~, Clerk

By *[Signature]* Deputy

Case No. 2377.

U.S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
CLAIMANTS EXHIBIT A
Received FEB. 9 1914
F. D. MONKTON, Clerk.

AGREEMENT.

THIS AGREEMENT attached to and made a part of the shipping articles between **PORT HEIDEN PACKING CO.**, a corporation of Seattle, Washington, party of the first part, and each of the men signing the articles, hereinafter referred to as party of the second part,

WITNESSETH:

Section 1. The parties of the second part hereby engage in the service of said party of the first part and agree and promise with and to said party of first part for the consideration hereinafter mentioned, that they will during the time they shall remain in the employ of said party of the first part, faithfully and diligently work and labor in the capacity of **SEAMEN, FISHERMEN, BEACHMEN, TRAPMEN.** Also to work on boats, lighters, steamers and in salteries, canneries, and (or) any other capacity, up and down, and at and about Port Heiden, or elsewhere in Alaska, as directed by the superintendent, during the salmon fishing season of 1913.

Section 2. They agree to give their whole time and energy to the business and interests of said party of the first part and to work day or night (Sundays and holidays not excepted), according to the lawful orders of the captain, superintendent, or whoever may be in charge for the party of the first part, as per specifications of these articles, and for the compensation herein provided, but shall not be required to work for outside parties.

Section 3. The time of service shall be from the date of sailing from, until return to Seattle, Washington, all on vessels to be designated by the party of the first part.

Section 4. Before fishing commences and after it has closed the men shall have one day off in every seven, and if that is not given, they are to be paid at the rate of 40c per hour per man for every hour worked on Sunday.

No. 2377

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MANHATTAN CANNING COMPANY, a corporation,

vs.

J. W. WILSON,

Appellee
Appellee.

*Appeal from the United States District Court for
the Western District of Washington.*

HON. JEREMIAH NETERER, DISTRICT JUDGE.

BRIEF OF APPELLANT

STATEMENT.

This appeal is from a decree of the United States District Court, for the Western District of Washington, Northern Division, in favor of the appellee (libelant below) on a libel in personam, to recover wages, maintenance and expenses of cure.

The libel, filed May 16th, 1913, alleges, in substance, that appellant (respondent below) is the owner of the American brig, "Harriet G."; that on April 21st, 1913, appellee shipped as cook for a six months voyage to Port Heiden, Alaska, at

\$80.00 per month, and went aboard on said day, remaining until April 23rd, 1913; on which day, while the brig was being shifted in the harbor from the dock to an anchorage, he fell on the deck without fault on his part, and so injured his shoulder and wrist that he was unable to continue in the service of the ship and perform his duties as cook; that at the direction of his master and officers, he was removed to the Providence Hospital, where he remained from April 23rd, 1913, until May 5th, 1913, incurring a hospital bill of \$30.60, and a surgeon's bill of \$50.00; that he is unable to work, and will continue so during the remainder of the six months, and that there is no communication by which he can join the vessel; and that appellant has hired a cook to replace appellee.

The libel concludes with a prayer for wages for the entire voyage, for the expense of cure, maintenance during the six months, and further medical attendance (Record, pp. 3-6 inc.).

Appellant excepted to the libel on the grounds that appellee's employment ceased before the voyage was commenced, and that under section 4527 of the Revised Statutes, appellee could, in no event, recover more than one month's wages (Record, p. 9).

These exceptions were overruled, and thereupon appellant filed its answer, denying the material allegations of the libel, and alleging an express agreement in the shipping articles that the time of service should be from the date of sailing until return to Seattle; that the brig sailed on April 25th, 1913,

two days after the date of the alleged injury, and that appellee's term of employment had not commenced at the time of the alleged injury; that the shipping articles expressly provided that appellee was not to bring any intoxicating liquors on board, and that appellee was to conduct himself in a careful and sober manner, these conditions being a part of the consideration for the promise of appellant to pay the wages to appellee; that appellee violated said articles by bringing liquor on board, a quantity of which he drank so that he was unable to conduct himself in a careful and sober manner (Record, pp. 15-18 inc.).

The cause was referred to the United States Commissioner, and after hearing the testimony, he made findings and conclusions permitting the recovery by appellee of wages for the entire voyage, \$440.00; for hospital services, \$30.60; and for medical attendance, \$50.00; a total of \$520.60 and costs (Record pp. 63-66 inc.). To this report, the appellant excepted, claiming error in the allowance of wages for the entire voyage and also to the recovery of the hospital and medical expense, and also to the refusal of the commissioner to enter a decree for appellant (Record, pp. 67-68).

The findings and conclusions of the Commissioner were sustained (Opinion of Judge Neterer, Record, p. 69; 210 Fed. 898), and a decree was entered accordingly, from which decree this appeal is prosecuted (Record, pp. 73-75 inc.); and appellant has filed the following:

ASSIGNMENTS OF ERROR.

“I.

The decision of the court and the order overruling respondent's exceptions to the libel, which said exceptions are as follows, to wit:

‘1. (Exception) Because from the allegations of the libel it appears that libelant's employment ceased before the commencement of the voyage, and that libelant is therefore not entitled to the relief claimed, to wit: wages for the entire voyage, nor is libelant entitled to wages under the allegations of the libel for any period to exceed one month’
was and is, and is here assigned as error.

II.

The court erred in refusing to find that, from the allegations of the libel, libelant was not entitled to the relief claimed, to wit: wages for the entire voyage, nor to wages for any period to exceed one month.

III.

The cause having been referred to A. C. Bowman, United States Commissioner, to take the testimony and make findings of fact and conclusions of law, and said Commissioner having found for the libelant and against the respondent in the sum of \$520.00 and costs, which findings and conclusions were confirmed by the court over the exceptions of respondent, re-

spondent and appellant here assigns, as error, the refusal of the court to sustain the exceptions of respondent, which were and are as follows, to wit:

‘1. Respondent excepts to the allowance of wages to libelant at \$80.00 per month from April 21st, 1913, to October 5th, 1913, amounting to \$440.00, the same being contrary to the law and the evidence.’

‘2. Respondent excepts to the allowance to libelant of \$30.60 for hospital services and \$50.00 for medical attendance, the same being contrary to the law and the evidence.’

‘3. Respondent excepts to the conclusion that a decree should be entered in favor of libelant and against respondent in the sum of \$520.00 with costs, the same being contrary to the law and the evidence.’

‘4. Respondent excepts to the refusal of the commissioner to find that respondent was entitled to a decree in its favor, with costs, the same being supported by the law and the evidence.’

IV.

The court erred in confirming the findings and conclusions of the United States Commissioner as aforesaid.

V.

The entering of the final decree in favor of the libelant and against respondent was and is, and is here assigned as error.

VI.

The refusal of the court to enter a decree in this cause in favor of respondent and against libelant, was and is, and is here assigned as error." (Record, pp. 77-79 inc.)

POINTS AND AUTHORITIES.

ASSIGNMENTS OF ERROR I and II involve the decision of the court, overruling the exceptions to the libel. These exceptions were based on section 4527 of the Revised Statutes, which provides:

"Any seaman who has signed an agreement and is afterward discharged before the commencement of the voyage or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the court hearing the case, of having been improperly discharged, recover such compensation as if it were wages duly earned."

This section is part of the act of June 8, 1872, Chapter 327, 17 Stat. at L., 262.

The exceptions were overruled on the express ground that the above act was repealed by the act of June 9, 1874, as far as coastwise voyages are concerned, the opinion of the court stating:

“This repeal is still effective, as, so far as the section relied upon by respondent is concerned, there has been no re-enactment.”

(Opinion of Judge Cushman, Record, p. 14, 205 Fed., p. 997.)

Both court and counsel overlooked the later act of August 18, 1890 (6 Fed. Stat. Ann., p. 851), which provides:

“When a crew is shipped by a shipping commissioner for any American vessel in the coastwise trade, * * * such seamen shall be discharged and receive their wages as provided by * * * sections four thousand five hundred and twenty-six, *four thousand five hundred and twenty-seven.*”

It appears that section 4527 of the Revised Statutes was extended to coastwise voyages, and that such seamen shall be discharged and receive their wages as provided in section 4527; therefore, the decision of the court overruling the exceptions was based on a misapprehension of the law.

This case involves the discharge and amount of wages due a seaman shipped coastwise by the shipping commission^{er}, so that the foregoing statute is controlling. We do not concede that appellee is entitled to the one month's pay, but we most earnestly insist that under no circumstances should he be allowed to recover wages in excess of that amount.

The allegations in the libel that appellee within two days after signing the articles and before the

ship left the harbor, without fault on his part, dislocated his shoulder

“so that he was unable to continue in the service of said ship and perform his duties as cook” clearly bring this action within the purview of section 4527 of the Revised Statutes.

Appellant has at all times insisted that the voyage had not commenced at the time of the alleged injury, but this point is immaterial as the statute also expressly includes cases in which the employment ceased before one month's wages were earned.

Section 4527 of the Revised Statutes was construed in the *STAGHOUND AND THE GAME-CK*, 97 Fed. 973 (District Court of Oregon), in which case it was held that seamen shipping for a voyage to Alaska which was terminated by the unseaworthiness of the vessel, were entitled to one month's wages. The same rule should govern in any case in which a seaman was discharged without fault on his part. In the case at bar, the libellant is either entitled to recover one month's wages, or he is entitled to none at all. The denial that the statute controls is, in effect, a denial of the wrongful discharge, or, in other words, an admission that he was rightfully discharged.

In the *ST. PAUL*, 77 Fed. 998, the seamen were allowed one month's wages under the statute, where their discharge was caused by an injury to the ship without fault on their part.

This question was re-argued to the court on the exceptions to the Commissioner's report, and counsel for appellee in an attempt to defeat the operation of the statute, raised, for the first time, the objection that appellee was never discharged. There is no evidence to support this contention, and the allegations of the libel as we have already seen, are that

“he was unable to continue in the service of said ship,”

which words are open to no other construction than that his employment did not continue thereafter.

Notwithstanding the said allegations in the libel, and the absolute lack of evidence that appellee was or was not discharged, the court sustained the contention of appellee upon the theory that he was entitled to his wages when discharged, and there being no evidence of any payment of wages to him, he was not discharged (Opinion of Judge Neterer, Record, pp. 69-73 inc., 210 Fed. 898).

Similarly, it might be argued that if the law required the collection of fare from a passenger before he boarded a train, and there was no evidence that his fare had been collected, it follows that he could not be on the train.

There is nothing in the case to support any such arguments on the part of counsel, and nothing to take the case out of the operation of the statute.

ASSIGNMENTS OF ERROR III, IV, V and VI, involve the right of appellee to recover in this action on the pleadings, law and evidence. The

pleadings have already been considered in the previous discussion.

The undisputed evidence shows that appellee brought a quantity of liquor on board, in clear violation of the shipping articles. He admits bringing a case of whiskey aboard, which was taken away from him by the captain (Record, p. 41). The latter testified that appellee brought a five gallon keg and a case of whiskey aboard (Record, p. 47). Here, therefore, was a clear breach of the express terms of the shipping articles, a certified copy of which was introduced in evidence (Exhibit A, Record, p. 89).

Appellee failed to conduct himself in a careful and sober manner. The testimony discloses that appellee's condition on the day of alleged accident was not as claimed by him. He testified under oath that the first drink that he took that day was after he had been sent ashore after the accident (Record, pp. 37, 41). He produced several witnesses to show that he was sober—two of whom were on the dock and saw the brig towed out to the anchorage. It is interesting^{to} note that one of these disinterested personal friends was a bartender (Record, p. 21). Some of appellee's own witnesses contradicted his statement. Lillico, the launch man, who brought him ashore, thought he might have had a drink or two (Record, p. 29). (Note: This was before appellee had taken his first drink, according to his testimony.) The doctor noticed the odor of liquor at 9:30 or 10:00 p. m., six hours after he took that

single bracer after the accident (Record, p. 59). There was no doubt in the minds of the captain and the mate but that the man had been drinking hard and was under the influence of liquor when the accident is alleged to have happened. Captain McInnis testified that the cook was drunk when the brig was towed away from the dock, and that no meal was served by him at noon (Record, pp. 46, 48.) A. McDonald, the mate, testified that the cook had been drinking all day, was drunk that afternoon, and that no noon meal was served (Record, pp. 49, 50). This is corroborated by the testimony of the seaman, A. Walters (Record, p. 52).

Finally, we have the entry on page 12 of the official log book, which was made at the time of the accident, and is signed by the mate and three seamen; this was read into the record and is as follows:

“Hauled out from pier 7 in tow of the tug Mystic. As the vessel was clear of the wharf, J. J. Wilson, the ship’s cook fell on deck and claimed to be hurt seriously. He was sent on shore to the hospital at his own request at the time he fell he was drunk.

Witnesses	Alex McDonald,	mate
	James Muir,	seaman
	— — Downie,	seaman
	A. Walters,	seaman.”

(Record, p. 54).

From the foregoing, we fail to see how there is any escape from the conclusion that appellee had

indulged his taste for alcohol to such an extent that he was under its influence, and was unable to conduct himself in a careful and sober manner at the time of the alleged accident. This constitutes a second breach of the express terms of the agreement, and we submit that the discharge in this case was fully justified under the circumstances and the express conditions of the shipping articles.

THE GARNET (District Court of California), 10 Fed. Cas. No. 5244, involved a very similar state of facts. The libelant, first mate, shipped on Friday, April 2nd, on which day the vessel was hauled out into the stream. He was discharged on Monday, April 5th, because of his conduct on Saturday in being intoxicated and unfit for duty. It was held that the discharge was justified.

“* * * That there is an important distinction between a discharge in the home port before the voyage has commenced, and one afterward in a foreign port, before the termination of the voyage, is, I think, perfectly plain to every mind. Clearly, when it appeared that a mariner, after weeks or months of faithful service, had been discharged and his wages claimed to be forfeited, the courts would require proof of more aggravated misconduct than when the seaman had been discharged in his home port before the voyage had begun. But in this case the misconduct happened on the day after the libellant shipped, before the voyage had begun, and before two days' wages had been

earned. True, the contract had been made and the master was bound to fulfill it, unless the misconduct of the mate was such, as under the circumstances, justified the master in discharging him. * * * What is said in the cases tending to establish the doctrine that a seaman ought not to be discharged for one act of drunkenness, disobedience or neglect of duty, it seems to me is not applicable to the case at bar. In those cases the seaman had been discharged in a foreign port after long and generally faithful service, and the language of the courts should be read in the light of the facts of the case in which it was used. The present is very different from such cases."

The Garnet, 10 Fed. Cs., No. 5244, p. 12.

The rule is more liberal in allowing the discharge of cooks than in the case of seamen:

"Although the cook and steward are authorized to sue in the admiralty court, as mariners and part of the crew, yet I have distinguished their cases, as their duties are distinct from those mariners employed in navigating the ship. If the cook or steward is found incapable, from dishonesty, drunkenness, extreme filthiness, gross ignorance or negligence, to perform their duty, I have often ratified their dismissal, with more latitude than that of mariners who may know and do their duty, though guilty of temporary aberrations; and I have not deemed the master so rigidly bound to receive them

though he may consent to the re-acceptance of their services.”

Black v. The Louisiana, 3 Fed. Cs. No. 1461, p. 503.

The case of RAYMOND v. THE ELLA S. THAYER, 40 Fed. 902 (District Court of California) involved a claim of a seaman for wages for the entire voyage and expenses of his cure, where he was put ashore and sent to the Marine Hospital at his own solicitation. These are substantially the facts in the case at bar, except that appellee was taken to a private hospital instead of to the United States Marine Hospital. It appears from the evidence, particularly the log book entry (Record, p. 54), that he was taken ashore at his own solicitation and *this was never denied*.

We quote from the opinion in the above case (p. 903):

“* * * A seaman injured in the ship’s service is undobutedly entitled to be cared for at the ship’s expense, and to his wages until the end of the voyage. But he cannot claim wages to the end of the voyage when he has obtained his discharge at his own solicitation, and against the advice and even the expostulations of the master.

* * * I know of no case where a disabled seaman, discharged in an American port, and at his own urgent solicitation, in order that he might be admitted to a United States marine hospital, has been allowed subsequent wages.

* * * But that a discharge in an American port, insisted on by the man, in order that he might go to a United States marine hospital, and reluctantly granted by the master, is a bar to a claim for wages until the end of the voyage, cannot, I think, be doubted."

In *JOHNSON v. BLANCHARD*, 7 Fed. 597, the libelant was denied wages for the whole voyage, it appearing that he had been left behind through his own negligence, having overstayed his shore leave.

We have examined carefully a number of cases cited by counsel for libelant, and have also made an exhaustive search for authorities which might, in any way, affect this question, but have found no decisions in which an exactly similar state of facts was involved, and the question is certainly a new one in this Circuit. The cases cited by counsel are not in point. A general rule of law could be deduced from them as follows: that where a seaman is injured during the voyage without fault on his part, he is entitled to his wages and expense of cure to the termination of the voyage; but in none of the cases are found the elements of discharge at his own solicitation, or intoxication, and the further fact that the alleged injury took place before the voyage was commenced, as in the case at bar.

Appellant's contention that the voyage had not yet commenced, is supported by "*The Garnet*" (Cal.), 10 Fed. Cs. No. 5244, which has already been quoted. In both cases, the discharge took

place two days after the articles had been signed, during which time the vessels were hauled out into the stream. The language of the court, in "The Garnet" (p. 12):

"* * * in this case the misconduct happened on the day after the libellant shipped, before the voyage had begun, and before two days' wages had been earned."

exactly covers the facts in the case at bar.

In *HIGHLAND v. HARRIET C. KERLIN*, 41 Fed. 222, the *W. L. WHITE*, 25 Fed. 503, and *OLSON v. WHITNEY*, 109 Fed. 80 (relied upon by appellee), were involved claims for wages and cure where the seaman was injured during the voyage. In these cases, the injured seamen either continued with the ship to the end of the voyage or were put ashore during the voyage; and it also appears that the injuries received were without fault on the part of the various libelants.

The *ROBERT C. McQUILLEN*, 91 Fed. 688, announces the rule that a seaman injured or taken sick in the service of the ship, and left in a foreign port without his consent, is entitled to full wages to the end of the voyage, or until restored to health. (Note: Libelant in that case was injured while homeward bound.)

The *BUNKER HILL*, 198 Fed. 587, involved a claim for damages because of appendicitis alleged to have been contracted through a fall during the voyage. Having received his wages and cure, the libel was dismissed.

PETERSON v. CHANDOS, 4 Fed. 645, involved no claim for wages, but for \$5,000.00 damages because of a broken leg during the voyage, which it was alleged the Captain failed to treat in a skillful manner.

In the CENTENNIAL, 10 Fed. 397, wages were allowed to seamen injured during the voyage by neglect of officers.

The authorities which have been previously cited to sustain the position of appellant are much nearer to the proposition than anything produced by appellee.

CONCLUSION.

There is a principle involved in this case far more important than any financial benefits which might accrue from the reversal of this appeal. To sustain the judgment of the District Court, would mean the approval of a doctrine entirely new, extremely unfair, and one which would open the gateway to an immense amount of fraud to be perpetrated against ship-owners during the annual sailing for Alaska and elsewhere; and there would be practically no defense to such actions when instituted. We have no quarrel with authorities which require the care of a seaman injured during the voyage, but we most earnestly protest against any application of this doctrine which will permit a seaman, and especially a sea-cook, to go ashore at his own request before the ship leaves the harbor, when as he himself alleges, he was unable to continue in the service of the ship, and less than a month thereafter allow

him to recover wages for the whole voyage whether it last six months or three years. Whether drunk or sober, sick or well, no such cause of action should arise in his favor under these circumstances, and it is a strained and unwarranted interpretation of the law, eminently unfair and without justice to the ship-owner, to sustain the decree of the District Court.

We submit that the decree appealed from should be reversed and that a decree be entered in favor of appellant.

Respectfully submitted,

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HIRAM E. HADLEY,

CLYDE M. HADLEY,

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United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MANHATTAN CANNING COM-
PANY,

a Corporation,

Appellant,

vs.

J. W. WILSON,

Appellee.

No. 2377

APPEAL FROM THE UNITED STATES DIS-
TRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON.

HON. JEREMIAH NETERER, District Judge.

BRIEF OF APPELLEE

POINTS AND AUTHORITIES.

The first point relied upon by appellant is that the case must be controlled by the provisions of Section 4527 of the Revised Statutes, re-enacted by the act of August 18, 1890 (6 Fed. Statutes Annotated, page 851). It seems clear to proctor for appellee that this contention is utterly without foundation. This legislation does not purport to take from mariners, being injured or sick, their ancient remedy of

wages, maintenance and cure. It is plain that Congress in passing this Act intended to protect seamen from being employed on a voyage and then capriciously discharged. The case of the *W. L. WHITE*, 25 Fed. 503, makes this very clear. In that case a seaman had shipped from New York to Havana and back, and at Havana, in the service of the ship, received a hurt and was sent to the hospital. Upon the application of the master, the U. S. Consul discharged libelant, receiving wages up to date and one month's extra wages. The consul applied this fund to the payment of the mariner's hospital bill and voyage home. The mariner thereafter libeled the vessel for his wages to the end of the voyage and was permitted to recover, the court holding that the ship was bound to pay the expenses of his cure, and that the collection of one month's extra wages, as required by the statute regulating the discharge of seamen by consuls in foreign ports did not bar his rights to all wages during the voyage and maintenance and cure.

The "*CHAS. D. LANE*," 106 Fed 746, and the "*J. D. PETERS*," 78 Fed. 368, clearly show the error of the position of the appellant.

The "*STAGHOUND*" and the "*GAME-COCK*," 97 Fed. 973, cited by appellant, when carefully read, sustains the position of appellee; namely, that section 4527 covers the giving or breaking up of the voyage or the capricious discharge of the seaman.

Furthermore, there is absolutely no evidence of discharge in this case. The libelant in his testimony (Record 35-36) says that as soon as he received his injury the mate, McDonald, directed the boatswain, acting as second mate, to take the libelant ashore; and that he was accordingly taken to the Providence Hospital by that officer. This is undisputed. There was no discharge. The law requires that coastwise seamen, when shipping before a Commissioner must be discharged before such commissioner.

The "J. D. PETERS," 78 Fed. 368.

In their second point, proctors for appellant challenge the right of the appellee to recover in this action on the pleadings, law and evidence.

The contention is made that the voyage had not begun at the time when the appellee received his injury. The undisputed fact is, that the vessel was fully loaded, with a part of her crew aboard, and that at the exact time of the injury she was being hauled out to a buoy in the harbor by a tug engaged for that purpose. The appellee had signed on and begun work April 21st and received his injury on the 23rd. Under these circumstances the voyage had begun.

Carver on "Carriage by Sea," Sec. 148;
BOWEN vs. HOPE INS. CO., 37 Mass. 275,
32 Amer. Dec. 213.

SUN MUTUAL INS. C. vs. MISSISSIPPI
VALLEY TRANS. CO., 17 Fed. 919.

The contention is also made that the libelant at the time of receiving his injury was drunk. The clear weight of the testimony refutes this contention. C. C. Young (Rec. 21), A. Antenose (Rec. 22), J. D. McDonald (Rec. 24-25), Matthew Murray (Rec. 26), Roy Lillico (Rec. 27), M. L. Kenyon (Rec. 32), and the libelant (Rec. 34-37) all show plainly that the appellee was sober and was not drunk. All of these witnesses except appellee are disinterested, and the Commissioner who heard every one of them testify, found for the appellee upon this question of fact, and it is submitted that no showing is made on behalf of appellant which would justify this Court in reversing the finding of the Commissioner. The little testimony upon this subject, to the effect that the appellee was intoxicated, is plainly an afterthought. The testimony of the master (Rec. 43 et seq.) is that he was not aboard at the time of the accident and at page 47 testifies that the cook brought aboard a quantity of liquor, and that he took it away from him and stowed it away.

McDonald, the mate, says that he did not pay any attention to the cook on that day until he was hurt (Rec. 50). Walters (Rec. 53) says that the cook's condition did not attract his attention until after he was injured.

The further point is made that the appellee brought liquor aboard in violation of the shipping articles. It is not contended, however, that the appellee got any of this liquor or had any opportunity

to drink it. It is a singular fact that the master was there to receive the liquor and stow it away when brought on board by the appellee. It does not appear either that the master even went so far as to reprimand the appellee for bringing it aboard. This bears out appellee's testimony that the liquor was brought on in pursuance of an understanding with the master (Rec. 41).

We submit that nothing has been shown to take this case out of the established rule that a sailor injured in the service of his ship is entitled to receive his wages to the end of the voyage, his maintenance and the expense of his cure.

The "W. L. WHITE," 25 Fed. 503;
 PETERSON vs. the "CHANDOS," 4 Fed.
 645;
 HIGHLAND vs. "HARRIET C. KER-
 LIN," 41 Fed. 222;
 OLESEN vs. WHITNEY, 109 Fed. 80;
 "THE TROOP," 118 Fed. 769;
 The "ROBERT C. McQUILLEN," 91 Fed.
 688.

The alleged drunkenness must be such as to have brought about the injury of the libellant or must positively disqualify him to perform his duties.

The "VILLA Y. HERMAN," 101 Fed. 132.

By reason of poverty the appellee was not able to take a cross appeal from that portion of the decree disallowing, or failing to allow, the appellee his costs of maintenance.

We submit that this appeal is a trial of the action de novo, and that this Court has full jurisdiction upon this general appeal to grant the appellee further relief.

The "SARATOGA," Fed. Cases, No. 12, 356;

The "HESPER," 122 U. S. 256;

PETTIE vs. BOSTON TOWBOAT CO., 49
Fed. 464.

This being so, we submit that under the evidence in this cause (Rec. 37-38) this Court should increase the allowance to the appellee by the sum of at least \$1.50 per day from the time when he left the hospital until October 5th—\$240.00.

It is respectfully submitted that this appellee was left destitute in the City of Seattle, and is still unable to work, and his maintenance should be allowed him.

While not undertaking to suggest the action of this Court, proctor for the appellee earnestly requests early consideration of this case, if not incompatible with the engagements of the Court, owing to the destitute condition of the appellee.

The supposed hardships conjured up by proctors for appellant in their brief will not be considered by this Court. The statements of counsel in their brief might very well be urged before a congressional committee having in charge a bill for changing the admiralty law. This Court, however, will not modify or change the law, or make new law, but will administer the admiralty law as it has

been established since the earliest times, giving to an injured seaman his wages, his maintenance and the expense of his cure. The decree of the trial court is clearly correct and should be in all things affirmed except to modify it to include maintenance for appellee.

Respectfully submitted,

JAMES KIEFER,
Proctor for Appellee.

No. 2379

United States
Circuit Court of Appeals
For the Ninth Circuit.

FAIRBANKS, MORSE & COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

J. M. NELSON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

FILED
MAR 16 1914

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For the Fairbanks, Morse & Company, a Corporation, Plaintiff in Error:

STUTSMAN & STUTSMAN, Esqs., 903 California Building, Los Angeles, California.

For J. M. Nelson, the Defendant in Error:

COLLIER & CRAIG, Esqs., Riverside, California. [4*]

In the District Court of the United States, in and for the Southern District of California, Southern Division, Sitting at Los Angeles.

AT LAW—183—CIVIL.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

Writ of Error [Original].

United States of America,—ss.

The President of the United States, to the Hon. OLIN WELLBORN, Judge of the District Court of the United States for the Southern District of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in

*Page-number appearing at foot of page of original certified Record.

the said District Court before you, between Fairbanks, Morse & Company, a Corporation, plaintiff in error, and J. M. Nelson, defendant in error, a manifest error hath happened, to the damage of Fairbanks, Morse & Company, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so [5] that you have the same at San Francisco, in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, this the 28th day of January, A. D. 1914.

[Seal] WM. M. VAN DYKE,
Clerk of the United States District Court of the
Southern District of California.

Allowed this the 28th day of January, A. D. 1914.

OLIN WELLBORN,
United States Judge.

I hereby certify that a copy of the within Writ of Error was on the 28th day of January, 1914, lodged in the Clerk's office of the said United States District Court, for the Southern District of California, Southern Division, for the said defendant in error.

WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of California.

By Chas. N. Williams,
Deputy. [6]

[Endorsed]: 183—At Law—Civil. In the District Court of the United States, in and for the Southern District of California, Southern Division, Sitting at Los Angeles. Fairbanks, Morse & Company, a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Writ of Error. Filed Jan. 28, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [7]

In the United States District Court, in and for the Southern District of California, Southern Division, Sitting at Los Angeles.

183—AT LAW—CIVIL.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

Complaint.

Plaintiff, for cause of action herein, and complaining of the above-named defendant, avers and states:

I.

That the plaintiff is a corporation organized and existing under and by virtue of the general incorporation laws of the State of Illinois, with its principal place of business in the city of Chicago in said State and doing business in said State.

II.

That the defendant is a citizen of the State of California, and a resident of the County of Riverside in said State.

III.

That heretofore, to wit, on or about March 25, 1912, in the County of Riverside, State of California, the plaintiff made and entered into with the defendant a written contract or agreement, a copy of which is hereto attached as exhibit "A" and by this reference, made a part hereof.

IV.

That, pursuant to the terms of said written contract, the defendant made, executed and delivered to the plaintiff his three promissory notes in the sum of \$1200.00 each due and payable June 25, 1912, March 25, 1913, and March 25, 1914, respectively, copies of which notes are hereunto attached and marked respectively, exhibits "B," "C" and "D."

V.

That, pursuant to the terms of said written contract aforesaid, [11] the plaintiff agreed to sell

and the defendant agreed to buy one certain 60 horse-power Fairbanks-Morse Oil Tractor and certain equipment for the sum of \$3,600.00, and that, pursuant to the terms of said written contract, the plaintiff delivered to the said defendant and the said defendant received from the plaintiff the said Oil Tractor and the said equipment at the town of Alessandro in said Riverside County, California, and the plaintiff has complied in all respects upon its part with said written contract with the defendant.

VI.

That, as required therein, the plaintiff furnished to the defendant a competent man for a period of two days within ten days of the receipt of the said engine by defendant for the purpose of operating and demonstrating the said engine, and that thereafter the defendant continued to use and operate the said engine until the present time with full knowledge of its capacity.

VII.

That, although demand has been made upon defendant by plaintiff for the payment of the promissory note which became due June 25, 1912, the said note or any part thereof has not been paid by the defendant to the plaintiff, and, under the terms of the said written contract between the said parties the entire amount of said purchase price together with interest became due and payable at the option of the plaintiff which option is now so exercised by said plaintiff.

VIII.

That by the terms of the said written agreement

the defendant promised and agreed to pay all attorney's fees and expenses incurred [12] by plaintiff in the collection thereof and plaintiff avers that it has become necessary to employ and plaintiff has employed Messrs. Stutsman & Stutsman, Attorneys at Law of Los Angeles, Calif., to commence suit and enforce collection thereof and that the sum of \$360.00 is a reasonable sum to be allowed as attorney's fees herein and is the amount agreed to be paid by the defendant under the terms of the said notes.

IX.

That no part of the said notes or of the said attorney's fees have been paid by the defendant to the plaintiff and the whole thereof is now due, owing and unpaid.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of \$3,600.00, together with interest thereon as provided by the terms of the promissory notes, given at the time of the execution of said written contract, and the further sum of \$360.00 as attorney's fees to plaintiff's attorneys and costs of suit herein.

STUTSMAN & STUTSMAN,

Attorneys for Plaintiff. [13]

Exhibit "A" [to Complaint].

**FAIRBANKS-MORSE GAS AND GASOLINE
ENGINES.**

Los Angeles, Cal., Mar. 25, 1912 19...

Mr. J. M. Nelson,
Moreno, Cal.

Dear Sir:—

We hereby propose to furnish one 60-H. P. (actual) Fairbanks-Morse Oil Tractor, F. O. B. Alessandro, Cal.

This engine has been tested at our factory at Beloit, Wis., with a break test and "Fairbanks" scale and over 60 actual horse-power developed.

With this engine we furnish one pulley; one galvanized steel supply tank, with necessary pipe and fittings to connect tank; exhaust pipe and fittings; one electric ignitor and battery; necessary wrenches and oil can; and with each Fairbanks-Morse horizontal engine, over 8 H. P., we furnish our XXX.

The bearings of this engine are of XXXX and the crank shaft and connecting rod of forged steel. The valves are water jacketed.

We guarantee this engine and all other machinery furnished hereunder to be made of good material and in a workmanlike manner and if any part of said engine or machinery shows defective material or workmanship within one year, we agree to furnish a new part free of cost to replace such defective part, but we assume no liability for, nor will we be responsible for damages or delays caused by such defective material or workmanship, nor will we make any al-

lowance for repairs or alterations made by others, unless some are made with our written consent.

With the above engine we also propose to furnish:

Above engine is sold with the understanding that it proves adequate for your work. For the purpose of testing out engine, we agree to furnish a competent man for 2 days within 10 days of receipt of engine at Alessandro. This man to operate and demonstrate [14] the engine regular working hours during his stay on your place. On or before the 5th day you agree to decide whether engine complies with your requirements or not. If you find engine is not sufficient for your needs, you agree to give our men all necessary assistance loading the engine at Alessandro, pay freight on same to Los Angeles and this contract becomes void.

The price of above machinery is \$3600.00 Thirty-six hundred.....Dollars payable in gold coin at the office of Fairbanks, Morse & Company, Los Angeles, California, which sum said J. M. Nelson agrees and promises to pay as follows:

\$1200.00 cash on or before June 25, 1912.

1200.00 “ “ “ “ Mar. 25, 1913.

1200.00 “ “ “ “ Mar. 25, 1914.

All deferred payments to be evidenced by promissory notes dated Mar. 25, 1912, bearing seven per cent interest per annum, and if each and every payment is not made when due as above provided, then the entire amount, together with interest, shall immediately become due and payable at our option. You agree to pay all attorney's fees and expenses in-

curred by us in the collection thereof; whether suit is filed or not.

The title and right of possession to the property furnished under this agreement shall remain in Fairbanks, Morse & Company until all payments hereunder (including deferred payments and any notes, judgments or renewals thereof, if any) shall have been fully made in U. S. gold coin and the machinery and equipment herein described shall remain the personal property of Fairbanks, Morse & Company, whatever may be its mode of attachment to realty or otherwise, until fully paid for in U. S. gold coin and upon failure to make payments (or any of them) as herein provided, we may retain any and all payments which may have been made as liquidated damages, and may deny the use of said property or any part thereof [15] and be free to enter the premises where said machinery or equipment may be located, and to remove the same as our property without process of law and without prejudice to any further claims on account of damages which we may suffer from any cause, and we shall not be liable in any action at law or in equity for removing our property hereunder.

It is agreed that upon acceptance of this proposal we will make delivery of above machinery without unnecessary delays, and that the purchaser will receive the property herein specified in accordance with the terms of this contract, and shall become responsible therefor after its delivery at the point designated herein. The Purchaser also agrees to make good any loss to Fairbanks, Morse & Company,

occasioned by fire or any other cause after delivery at the point designated herein, and until the full amount herein agreed upon has been paid.

It is understood that we shall not be held responsible for any delay in delivery or loss occasioned thereby, which shall be caused by fire, strikes, non-receipt of material required, delays in transit, or any other cause beyond our control; also that the acceptance of apparatus by purchaser shall constitute a waiver of all claims for damages or loss occasioned by any delay which may have occurred.

Cancellation of this contract may be accepted by us under conditions satisfactory to us, in which case purchaser agrees to pay not less than twenty per cent of contract price.

It is understood that this contract is the only one existing between the parties hereto, and that all communications or understandings, either verbal or written, contrary to this proposal and specifications, are hereby withdrawn and annulled.

This contract is subject to the written approval of the Agent of Fairbanks, Morse & Company at Los Angeles, California, and when so approved shall immediately become binding on all [16] parties hereto.

Respectfully submitted,

FAIRBANKS, MORSE & CO.

By (Signed) H. J. REULAND.

Accepted:

(Signed) J. M. NELSON.

Approved:

'Signed' C. KNAGENHELM.

References:

OK.—MEYER

DILLE.

COPY.

(Endorsed):

CONTRACT.

No.

With

.....

Engine No.

Price \$.

Date

Shipped.

Payable

Sold by

Erected by

[17]

Exhibit "B" [to Complaint].

\$1200.00. Los Angeles, Calif., Mar. 25, 1912.

No.

Fairbanks
Standard
Scales.

Windmill
World
Eclipse
Trade Mark.

Ninety days after date for value received I promise to pay to FAIRBANKS, MORSE & CO. Inc., or order at Citizens' National Bank, Los Angeles, Twelve hundredDollars, with interest from date until paid at the rate of seven per cent per annum payable at maturity, and if not so paid, the interest shall become a part of the principal and thereafter bear like interest as the principal. Should this note be placed in the

hands of an attorney for collection, I agree to pay an additional sum of ten per cent on principal as attorney's fees. Principal and interest payable in gold coin of the United States.

(Signed) J. M. NELSON.

Address—Moreno, Cal.

“

“

COPY. [18]

Exhibit “C” [to Complaint].

\$1200.00.

Los Angeles, Calif., Mar. 25, 1912.

No.

**Fairbanks
Standard
Scales.**

**Windmill
World
Eclipse
Trade Mark.**

One year after date for value received I promise to pay to FAIRBANKS, MORSE & CO., Inc., or order at Cit. Nat'l Bank, Los Angeles, Cal., Twelve hundred Dollars, with interest from date until paid at the rate of seven per cent per annum payable at maturity, and if not so paid, the interest shall become a part of the principal and thereafter bear like interest as the principal. Should this note be placed in the hands of an attorney for collection, I agree to pay an additional sum of ten per cent on principal as attorney's fees. Principal and interest payable in gold coin of the United States.

(Signed) J. M. NELSON.

Address—Moreno, Calif.

“

“

COPY. [19]

Exhibit "D" [to Complaint].

\$1200.00. Los Angeles, Calif., March 25, 1912.

No.

Fairbanks
Standard
Scales.

Windmill
World
Eclipse
Trade Mark.

Two years after date for value received I promise to pay to FAIRBANKS, MORSE & CO., Inc., or order at Cit. Bat'l. Bank, Los Angeles, Cal., Twelve hundred. Dollars, with interest from date until paid at the rate of seven per cent per annum payable at maturity, and if not so paid, the interest shall become a part of the principal and thereafter bear like interest as the principal. Should this note be placed in the hands of an attorney for collection, I agree to pay an additional sum of ten per cent on principal as attorney's fees. Principal and interest payable in gold coin of the United States.

(Signed) J. M. NELSON.

Address—Moreno, Cal.

“

“

COPY. [20]

State of California,

County of Los Angeles—ss.

C. Knagenhelm, being by me first duly sworn, deposes and says: that he is agent for plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon

his information or belief, and as to those matters that he believes it to be true.

C. KNAGENHELM,

Subscribed and sworn to before me this 22 day of July, 1912.

[Seal]

J. F. DAVENPORT,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 183—Civil. At Law. In the District Court of the United States, in and for the Southern District of California, Southern Division. Complaint. Money Due on Contract. Fairbanks, Morse & Co. vs. J. M. Nelson. Stutsman & Stutsman, 903 California Building, Los Angeles, Calif., Attorneys for Plaintiff. Filed Jul. 22, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [21]

[Summons.]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,

Defendant.

Action Brought in the Said District Court, and the Complaint Filed in the Office of the Clerk of Said District Court, in the City of Los Angeles, County of Los Angeles, State of California.

The President of the United States of America, Greeting, to J. M. Nelson.

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the District Court of the United States, in and for the Southern District of California, Southern Division, and to file your plea, answer or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the Clerk of said Court, in the City of Los Angeles, County of Los Angeles, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

And you are hereby notified that unless you appear and plead, answer or demur, as herein required, the plaintiff will take judgment for any money or damages, demanded in the complaint, as arising upon contract or will apply to the Court for any further relief demanded in the complaint.

WITNESS, the Honorable OLIN WELLBORN, Judge of the District Court of the United [22] States, in and for the Southern District of California, this 22d day of July, in the year of our Lord, one thousand nine hundred and twelve, and of our Independence the one hundred and thirty-seventh.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk.

United States Marshal's Office,
Southern District of California.

I HEREBY CERTIFY, that I received the within writ on the 25 day of July, 1912, and personally served the same on the 29 *July* day of July, 1912, by delivering to and leaving with J. M. Nelson, said defendant named therein, personally, at the County of Riverside, in said District, a certified copy thereof, together with a copy of the Complaint, certified to by Wm. M. Van Dyke, attached thereto.

LEO V. YOUNGWORTH,

U. S. Marshal.

By E. Dingle,

Deputy.

Los Angeles, July 29, 1912.

[Endorsed]: Original. Marshal's Civil Docket No. 1943. No. 183-Civil. U. S. District Court, Southern District of California, Southern Division. Fairbanks, Morse & Co. vs. J. M. Nelson. Summons. Stutsman & Stutsman, Plaintiff's Attorneys. Filed Jul. 31, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. 2 Com. L. 21. [23]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,

Defendant.

Answer.

Comes now J. M. Nelson, defendant in the above-entitled action, and answering the complaint of the plaintiff herein, admits, denies, and alleges, facts as follows:

I.

Answering the first paragraph of plaintiff's complaint, this defendant states that he has no information or belief as to whether or not the plaintiff in this action is a corporation organized and existing or a corporation organized or existing under and by virtue of the general corporation laws of the State of Illinois; or as to the location of the principal place of business of the corporation in said state; or any other state, and, placing his answer upon these grounds, denies that the said plaintiff is a corporation organized and existing or organized or existing under the general or any incorporate laws of the State of Illinois or any other state, and denies that said corporation has its principal place of business in the City of Chicago, State of Illinois.

II.

This defendant admits the allegations in the second paragraph of plaintiff's complaint. [24]

III.

This defendant admits that on or about the 25th day of March, 1912, in the County of Riverside, the plaintiff prepared a contract, signed by H. J. Reuland and approved by C. Knagenhelm, as the same is set out by copy attached to plaintiff's complaint as exhibit "A"; that this defendant signed the same

as accepted at or about the date March 25th, 1912, as shown upon said contract, but this defendant avers that said contract is unintelligible and by mistake and oversight does not express the agreement as made by the parties in the following particulars; that the language in said contract is as follows: "For the purpose of testing out engine we agree to furnish a competent man for 2 days within 10 days of receipt of engine at Alessandro." That said language is unintelligible and meaningless, and was not the language used, or in that respect the contract made by and between the parties, and that the same was inserted in said contract by mutual mistake, and oversight before said contract was signed; that this agreement with respect to said matter was as follows: That within two days after the delivery of said engine to Alessandro for the purpose of testing out said engine the plaintiff, Fairbanks, Morse & Company, agreed to furnish a competent man for the purpose of testing out said engine, and to operate and to demonstrate the same, during regular working hours for five days, and that this defendant on or before the end of the fifth day, was to decide whether said engine complied with his requirements or not; and this defendant alleges that said contract should be reformed and corrected to express the agreement of the parties so made at the time of and before the signing of said contract; and that this contract as above stated and corrected was the only contract made or agreed to be made between this defendant and the plaintiff [25] or its agents.

IV.

Defendant admits the allegation contained in the fourth paragraph of plaintiff's complaint. This defendant admits that on or about the first day of April, 1912, the engine was delivered on board the cars at Alessandro station, in Riverside County, California, and was unloaded from the cars at said station; *but* this defendant denies that the plaintiff has complied in all respects upon its part with the written contract as made and entered into by and between the parties hereunto, for this defendant alleges that by the terms of said agreement, it was understood and agreed by and between the parties, and the said engine was to be sold with such understanding and agreement that the same should prove adequate to perform the work of this defendant; that the said engine did not so prove adequate to perform the work of this defendant in accordance with the terms and guarantee of the plaintiff; that the said engine upon being delivered to the plaintiff at Alessandro and removed to the premises of this defendant, after all the changes and suggestions made by the plaintiff, and the engine failed entirely to perform the work of this defendant in the manner and to the extent both desired by this defendant and as represented to the defendant that the same would perform the work of the defendant.

That at the time of the removal of the same to the premises, after its delivery at Alessandro, the ground was wet and soft, and the attempt to operate the same proved a failure; that the agent and representative of the plaintiff remained on the grounds a few

hours endeavoring to operate the machine, and finally conceded that the ground was too wet and that the same could not, under those conditions and circumstances, be made a success, and within an hour or two after the agent of said plaintiff left the premises and left said machine in the hands of the [26] defendant, the same broke down and became absolutely worthless and helpless; that at the time of the attempt so made as stated hereinabove, the representative determined that the band or tire of the large drive-wheel of the engine was too narrow for the soil in which it was to be operated, and determined that the same would have to have an extension put on in order to make the same wider and give it greater bearing on the soil, and that in order to operate the same successfully, defendant declared his purpose of having such extension made and put on the machine.

That this defendant with the knowledge of the plaintiff still attempted to operate the machine without such band; that at all times while the defendant tried to operate, the same was a failure; that this defendant could make no time over the ground with the machine, that when it was in operation, it did not travel over his field drawing his plow at a greater speed than about a mile and one-half per hour, when it should have accomplished its work at the rate of about two and one-half miles per hour.

That during the first month and a half, and before any extension was put on the wheel as aforesaid, the machine broke down three times; plaintiff sent its men to repair and replace the broken parts and a large part of the time of the month and a half, the

machine stood idle, and the defendant was able to accomplish nothing with it, whatever.

That the plaintiff, also, by its agents, informed the defendant that the machine would do his work if he would purchase some other kind of plows than the ones in use on his farm, and some time after the said extension was put on, he did purchase a different kind of plow at a very large expense of some four or five hundred dollars; attached them to the machine, and upon endeavoring to operate the same, found that the machine made no better progress, and proceeded with his work at the same slow pace [27] and a pace much slower than the machine was represented to accomplish his work and slower than was practicable for the accomplishment of the work which this defendant desired to and purchased the machine to accomplish, and that the same proved an entire and complete failure, and did not in any manner comply with, or prove adequate for the work of the defendant, and the warranty and guaranty as to the engine and the work it would accomplish for the defendant was a complete and entire failure.

And this defendant further alleges that the plaintiff never at any time, either for two days or five days during regular working hours, sent or kept any representative of said plaintiff with said machine for the purpose of testing the same out, nor did the plaintiff at any time either for two days or for five days during regular working hours, continuously keep any representative of the Fairbanks-Morse Company with said machine to test the same, to operate the same, and to demonstrate the same, although this

defendant demanded and requested from time to time that the plaintiff should comply with the contract and should send a man to properly test and demonstrate the machine, and show to this defendant that the same would do his work in accordance with the guarantee and warranty as made in said contract; that the plaintiff failing to comply with this demand, this defendant notified the plaintiff that he was ready and willing at any time to assist the plaintiff or its employees in accordance with the terms of the contract to place the same on board the cars at Alessandro and was ready and willing to pay the freight on the same back to the City of Los Angeles, as specified in said agreement, and that the plaintiff absolutely refused and declined to accept the same, and refused and declined to send some representative to assist in loading the same; whereby and by reason whereof, the obligation of this defendant to pay the said notes or any part of the same [28] became null and void and of no effect, and the said contract became and was absolutely rescinded and void.

This defendant further avers that by reason of the facts set out and alleged hereinabove that the plaintiff herein waived at all times all provisions of said contract with reference to the time in which the said machine was *to tested* by, from time to time making changes on the same, waiting for weather and proper conditions of the soil, changes in plows, additional bands to be placed on the same, and continuously made excuses for the machine and proposed changes in order that they might demonstrate that the machine under different conditions would prove adequate to

do the work of this defendant, and that this defendant never at any time waived his right to have the machine properly tested by the plaintiff herein or its agent, in accordance with the terms of said contract.

And this defendant alleges that the notes and contract sued on in this action are void and of no effect, and never became due from the defendant nor did this defendant become obligated at any time to pay the same or any part of the same to the plaintiff in this action, or to pay any attorneys' fees or any other costs or expenses connected with this or any other litigation.

WHEREFORE this defendant prays that the said contract may be reformed and corrected to express the intention of the parties, and that judgment of this Court be entered, that the plaintiff take nothing by its action, and that the defendant have judgment for his costs hereinabove expended against the plaintiff.

J. M. NELSON. [29]

State of California,
County of Riverside,—ss.

J. M. Nelson, being first duly sworn, deposes and says that he is the defendant in the above-entitled action; that he has read the foregoing answer, and knows the contents thereof, and that the allegations of the same are true of his own knowledge except as to matters therein stated on his information and belief, and as to those matters, he believes the same to be true.

J. M. NELSON.

Subscribed and sworn to before me this 15th day of August, 1912.

[Seal]

A. C. LEWIS,

Notary Public in and for the County of Riverside,
State of California.

Personal service of the within answer and receipt of a copy thereof, is admitted this 16 day of August, 1912.

STUTSMAN & STUTSMAN,
Attorneys for Plaintiff.

[Endorsed]: No. 183—Civil. Dept. No. —, District Court of the United States, Southern District of California, Southern Division. Fairbanks, Morse & Co., a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Answer. Filed Aug. 17, 1912. Wm, M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Collier & Craig, Attorneys for Defendant, Riverside, California. [30]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,

Defendant.

Amendment to Complaint.

Now comes the plaintiff in the above-entitled cause and with leave of Court first had and obtained,

hereby offers and files the following Amendment to its complaint.

1.

Strike out all of paragraph three (3) in the original complaint and in lieu thereof insert the following:

“That heretofore, to wit, on or about March 25, 1912, in the County of Los Angeles, State of California, the plaintiff made and entered into with the defendant a written contract or agreement, a copy of which is attached to the original complaint herein as exhibit ‘A’ and by this reference made a part hereof.”

STUTSMAN & STUTSMAN,
Attorneys for Plaintiff.

State of California,
County of Los Angeles,—ss.

C. Knagenhelm, being by me first duly sworn, deposes, and says: That he is the agent of Fairbanks, Morse & Co., a foreign corporation, in the above-entitled action; that he has heard read the foregoing Amendment to Complaint, and knows the contents thereof; and [31] that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

C. KNAGENHELM.

Subscribed and sworn to before me this 19 day of March, 1913.

[Seal] C. A. STUTSMAN,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: 183—Civil. In the District Court of the United States, in and for the Southern District of California, Southern Division. Fairbanks, Morse & Co., a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Amendment to Complaint. Filed Mar. 19, 1913. Wm. M. Van Dyke, Clerk. —————, Deputy. Stutsman & Stutsman, Attorneys for Plaintiff. [32]

*In the District Court of the United States in and for
the Southern District of California, Southern
Division.*

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,

Defendant.

Stipulation Waiving Trial by Jury.

It is hereby agreed and stipulated by and between counsel for plaintiff and counsel for defendants in the above-entitled cause that a trial of this cause by a jury be and the same is hereby expressly waived, and the parties hereto agree that the trial of the issues framed by the pleadings herein may be by the court sitting without a jury.

STUTSMAN & STUTSMAN,

Attorneys for Plaintiff.

COLLIER & CRAIG,

Attorneys for Defendant.

[Endorsed]: 183—Civil. In the District Court of the United States, in and for the Southern District

of California, Southern Division. Fairbanks, Morse & Co., a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Stipulation Waiving Trial by Jury. Filed Mar. 19, 1913. Wm. M. Van Dyke, Clerk. ———, Deputy. Stutsman & Stutsman, Attorneys for Plaintiff. [33]

*In the District Court of the United States in and for
the Southern District of California, Southern
Division.*

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,

Defendant.

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial on the 19th day of March, 1913, before the Court without a jury, a jury trial having been duly waived by the parties; Messrs. Stutsman & Stutsman appearing as attorneys for plaintiff and Messrs. Collier & Craig appearing for defendant. Whereupon oral and documentary evidence was introduced on behalf of both plaintiff and defendant, and the cause was thereupon submitted to the Court for determination, and after due consideration thereof the Court finds from the evidence introduced the facts as follows, to wit:

(1) That the plaintiff is a corporation organized and existing under and by virtue of the general incorporation laws of the State of Illinois, with its principal place of business in the city of Chicago in

said State, and doing business in said State, and that the defendant is a citizen of the State of California and a resident of the County of Riverside in said State.

(2) That on or about the 25th day of March, 1912, in the County of Los Angeles, State of California, the plaintiff made and entered into with the defendant a written contract or agreement, a copy of which said contract is attached to the original [34] complaint herein and marked exhibit "A."

(3) That pursuant to the terms of said written contract the defendant made, executed and delivered to the plaintiff his three promissory notes in the sum of \$1200.00, each due and payable June 25, 1912, March 25, 1913 and March 25, 1914 respectively, copies of which notes are attached to plaintiff's complaint herein marked respectively exhibits "B," "C" and "D."

(4) That pursuant to the terms of said written contract aforesaid the plaintiff agreed to sell and the defendant agreed to buy one certain 60 horse-power Fairbanks-Morse Oil Tractor and certain equipment, for the sum of \$3,600.00. That it was provided in said contract and so understood and agreed by the parties hereto that said engine or tractor should prove adequate for the defendant's work. That the plaintiff has not complied in all respects upon its part with the said written contract with the defendant; that the engine or tractor for the sale and purchase of which said contract provided did not prove adequate for defendant's work, as understood and agreed by the parties and so provided in said con-

tract; and there was a breach of the warranty contained in said contract.

(5) That no evidence was introduced by the defendant at the trial upon the issue that the said contract did not express the agreement as made by the parties or upon the issue of whether said contract should be reformed, but that said issue was abandoned by the defendant.

(6) That the plaintiff through its authorized agents represented to the defendant that said engine or tractor could be made adequate for defendant's work by the addition of extensions upon the drive-wheels of said engine, and promised and agreed to furnish such extensions at its own cost and expense, and that the defendant with the knowledge of the plaintiff attempted to operate the machine without such extensions. That [35] after the addition of said extensions to said drive-wheels the said engine or tractor did not prove adequate for defendant's work, and upon the representation of the plaintiff that a different kind of plows were necessary to be used in connection with said tractor the defendant obtained such plows within a reasonable time, and that when used in connection with said plows the said engine or tractor still proved to be inadequate for defendant's work and that the said engine or tractor did not comply with or prove adequate for the work of the defendant and the warranty and guarantee as to the engine and the work it would accomplish for the defendant was a complete and entire failure.

(7) That said contract provided by its terms that the defendant should on or before the fifth day from

Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.
Collier & Craig, Attorneys for Defendant. Riverside, California.

Personal service of the within and receipt of a copy thereof is admitted this 11th day of September, 1913.

STUTSMAN & STUTSMAN,
Attorneys for Plaintiff. [38]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 183—CIVIL.

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,

Defendant.

Judgment.

This cause came on regularly for trial on the 19th day of March, 1913, Messrs. Stutsman & Stutsman appearing as attorneys for plaintiff and Messrs. Collier & Craig as attorneys for the defendant. A trial by jury having been waived by the parties the cause was tried before the Court without a jury, whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined, and documentary evidence was introduced by the respective parties, and the evidence being closed the cause was submitted to the Court for consideration and decision, and after deliberation thereon the Court files its find-

ings and decision in writing and orders that judgment be entered herein in favor of the defendant in accordance therewith.

WHEREFORE, by reason of the law and the finding aforesaid, it is ordered, adjudged and decreed that Fairbanks, Morse & Company, a corporation, the plaintiff, take nothing by its action against the defendant J. M. Nelson; that the writ of attachment herein issued be and is hereby discharged; and that the said defendant J. M. Nelson do have and recover of and from Fairbanks, Morse & Company, a corporation, the plaintiff, his costs and disbursements incurred in this action amounting to the sum of One Hundred Forty 40/100 (140.40) Dollars.

JUDGMENT entered September 22d, 1913.

WM. M. VAN DYKE,

Clerk.

By C. E. Scott,

Deputy Clerk.

[Endorsed]: No. 183-Civil. United States District Court, Southern [39] District of California, Southern Division. Fairbanks, Morse & Co., a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. (Copy of) Judgment. Filed Sep. 22, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [40]

[Certificate of Clerk U. S. District Court to
Judgment-roll.]

*In the District Court of the United States, for the
Southern District of California, Southern Di-
vision.*

No. 183—CIVIL.

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,

Defendant.

I, WM. M. VAN DYKE, Clerk of the District Court of the United States, for the Southern District of California, do hereby certify the foregoing to be a true copy of the JUDGMENT entered in the above-entitled action, and recorded in Judgment Book No. 2 of said Court for the Southern Division, at page 222 thereof, and I further certify that the foregoing papers hereto annexed, constitute the Judgment-roll in said action.

Attest my hand and the seal of said District Court,
this 22d day of September, A. D. 1913.

[Seal]

WM. M. VAN DYKE,

Clerk.

By C. E. Scott,
Deputy Clerk.

[Endorsed]: No. 183—Civil. In the District Court of the United States for the Southern District of California, Southern Division. Fairbanks, Morse & Co. vs. J. M. Nelson. Judgment-roll. Filed Sep-

tember 22, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Recorded Judg. Register Book No. 2, page 222. [41]

In the District Court of the United States, for the Southern District of California, Southern Division.

No. 183—CIVIL S. D.

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,

Defendant.

Conclusions of the Court on Trial.

The warranty which plaintiff gave to defendant was as follows:

“Above engine is sold with the understanding that it proves adequate for your work.”

There is no room for controversy but that plaintiff's work consisted both of plowing and harvesting; and I am satisfied from the evidence, that the engine was lacking in the speed and heavier than represented, and, besides, would not plow in the sandy places testified to by the witness Dickerson. On account of these defects, mainly lack of speed, it was inadequate for defendant's work; indeed, plaintiff virtually admitted this by furnishing and attaching, without cost to defendant, extensions to the wheel bands, as set forth below.

My conclusion on this branch of the case is, that there was a breach of the warranty.

II.

While the engine was being tried on defendant's ranch, April the 2d, 1912, Nelson testifies, that he called Reuland's attention to the fact, that the bull wheels sunk into the ground, cutting ruts several inches in depth, and Reuland represented [42] to him that extensions on said wheels would remedy the trouble, and, that such extensions would be provided in about ten days. (Nelson, pages 21, 33.) It is true, that Reuland denies making these representations (Transcript, 23), but Nelson is fully corroborated by the well established and pivotal facts, that the extensions were furnished and attached to the wheels at the instance and cost of plaintiff.

I am of opinion, that plaintiff's representations, promises and acts in the matter of these extensions were a waiver of the five days' limitation provided for in the contract, and, that the effect of this waiver was to give the defendant a reasonable time in which to decide whether or not the engine complied with his requirements.

This limitation, had it been effectual, would have forfeited a valuable right of the defendant, and was solely for the benefit of the plaintiff. These circumstances bring the case at bar within the doctrine of *Knarston vs. Manhattan Life Insurance Co.*, 140 Cal. 57, as to waiver, and render inapplicable sec. 1698, Civil Code, as well as *Hennehan vs. Hart*, 127 Cal. 656, and others in line therewith, construing said section.

Said extensions did not appreciably increase the

speed of the engine, but, of course, added to its weight.

Disc plows were then suggested by plaintiff as a remedy. They were procured on May the 28th by the defendant, at a cost of \$438.00, but also proved ineffectual; whereupon defendant telephoned plaintiff, that the engine was not doing the work required, and received a promise, in substance, that Mr. Reuland would go out and see about it. On June the 4th, defendant wrote to plaintiff, complaining still that the engine did not make the proper time, and wrote again on the 7th of the same month. Plaintiff replied to these letters June 11th, saying, among other things, [43]

“We regret that our Mr. Reuland has not been able to reach you as yet. From a letter we received from him this morning, we understand he has been spending his time around San Bernardino and Redlands, but as he contemplates spending his time in Perris Valley this week, we hope before you receive this letter that he has visited you.”

On June 13th, defendant, hearing nothing further from plaintiff up to that time, stopped the engine, and, the next day, notified plaintiff by letter, that the engine was still lacking in speed and of his readiness to return it.

Considering the finding I have already made, that there was a breach of the warranty, and the numerous hindrances to defendant's tentative operations of the engine by the breaking and replacement of its parts, for which he was in no way responsible, and the representations, promises and conduct of the

plaintiff with reference to the extensions and disc plows, and defendant's complaints May 29th, June 4th, and June 7th, as to the engine's lack of speed, and plaintiff's responses, to the effect, that the matter would have Reuland's attention, together with defendant's obvious desire and purpose to retain the engine, if, upon fair trial, it proved adequate to his work, I am of opinion, that his decision, announced June the 14th, 1912, to return the engine, was not unreasonably delayed.

Jackson vs. Porter Land & Water Company, 151 Cal. 32, does not contravene this conclusion, but one element of it is supported by the following extract from said case:

“This duty of inspection for the purpose of determining whether the property complies with the contract must be exercised within a reasonable time, and what is a reasonable time depends upon the circumstances of each particular case.” (Page 39.) [44]

Section 1691 of the Civil Code is inapplicable, because the question here is not one of rescission, where promptness is required, but of acceptance, where reasonable time is the rule.

Directly in point, however, is the following extract from a decision by the District Court of Appeals of this State, underscoring mine:

“The delay in the rescission of the contract has also been adverted to and was excusable for the reason mentioned. ‘If the return of the machine warranted to do good work and found upon trial to be unfit for use is delayed at the request of the

manufacturer, he thereby waives the right to require prompt delivery by the purchaser on discovery of the fact that it does not do the work guaranteed.' (Fox vs. Stockton etc., Works, 83 Cal. 333.) The buyer's retention and use of the article beyond the stipulated time will not operate as a waiver of the benefits of the warranty when it was at the instance of the seller or his agent *or when it was for the purpose of giving the seller or his agent an opportunity to remedy defects.* (30 Am. & Eng. Ency. of Law, p. 188.)" See, also, note 2 on said page. (Luitweiler etc. Co. vs. Ukiah Water Co., 16 Cal. App. 198.)

The authorities cited in said note strongly support the underscored clause of the *test*, and are: Jacobs vs. Crumbaker et al., 67 Ill. App. 391; The McCormick Harvesting Machine Co. vs. Hays, 89 Ind. 582; Kenney vs. Bevilheimer et al., 158 Ind. 653; and Walter A. Wood M. & R. M. Co. vs. Calvert, 89 Wis. 640.

The same doctrine is strongly supported by another California case, Sherman vs. Ayres, 16 Cal. App. Decisions 41.

Many other cases to the same effect are cited in defendant's brief, but it is unnecessary to enumerate them here.

Judgment will be entered for the defendant, and his attorneys are requested to prepare and submit to the Court suitable [45] findings, after serving a copy of the same on plaintiff's attorneys.

OLIN WELLBORN,
Judge.

[Endorsed]: No. 183—Civil. U. S. District Court, Southern District of California, Southern Division. Fairbanks, Morse & Company, a Corporation, vs. J. M. Nelson. Conclusions of the Court. Filed September 2, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [46]

In the District Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

AT LAW—CAUSE NO. 183—CIVIL.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

Engrossed Bill of Exceptions.

BE IT REMEMBERED, that in the trial of this cause on the 19th day of March, A. D. 1913, the Honorable OLIN WELLBORN, presiding, both parties appearing by counsel; the plaintiff represented by Messrs. Stutsman & Stutsman, and the defendant by Messrs. Collier & Craig, a trial was had to the court, a trial by jury having been waived, and a written stipulation waiving trial by jury having been offered and filed in the cause and the following proceedings had:

Counsel for plaintiff stated that this was an action at law based upon diversity of citizenship and that the plaintiff, an Illinois corporation, made a written contract with the defendant, a citizen of California, by the terms of which plaintiff agreed to sell and defendant agreed to buy an oil tractor,

for which defendant agreed to pay the sum of \$3600.00, in installments of \$1200.00 each, evidenced by promissory notes, payable April 25, 1912, April 25, 1913, and April 25, 1914, the contract providing that a failure to pay any note or installment gave plaintiff the right to declare the entire indebtedness due. Counsel stated that the first note was due and unpaid, and plaintiff had elected to declare the entire indebtedness due, and that no part of [47] the purchase price of said tractor had been paid by defendant. That plaintiff had delivered the said tractor to defendant according to contract, and defendant refused to pay for the same. That the contract provided that plaintiff should furnish a man for a period of two days within ten days after the engine was received by the defendant for the purpose of testing the engine, and that defendant agreed in the contract that on or before the fifth day, he was to decide whether the engine was adequate for his needs, it being specified in the contract that the engine was sold with the understanding that it proved adequate for the defendant's work. Counsel proposed an amendment to the complaint by which the allegation in the original complaint that the contract was made and entered into in Riverside County was changed so that it might appear that said contract was entered into in Los Angeles County, to which offer no objection was made by counsel for defendant, providing it be deemed that the amendment was denied. Counsel for defendant stated that it would be contended that the engine was not adequate for defendant's needs, and that plaintiff had not complied with said contract upon its part, and

that therefore there was no consideration for the said notes, and the same were void and defendant was not indebted to plaintiff. Counsel for defendant thereupon read defendant's answer beginning at paragraph III thereof.

Plaintiff offered in evidence a certified copy of the Articles of Incorporation of Fairbanks, Morse & Company, under seal and signature of the Secretary of State of the State of Illinois, whereupon the same was filed without objection and marked Plaintiff's Exhibit "A."

Whereupon, counsel for plaintiff offered in evidence the contract entered into between the parties which was filed without objection by counsel for defendant, except a certain lead pencil interlineation which was no part of the contract [48*—2†] and was marked as Plaintiff's Exhibit "B."

Counsel for plaintiff thereupon offered in evidence three promissory notes, each dated March 25, 1912, each for the sum of \$1200.00, and each signed by the defendant, J. M. Nelson, to the offer of which notes there was no objection by counsel for defendant, and the same were received in evidence as Plaintiff's Exhibits "C," "D" and "E," respectively.

[Testimony of Frank J. Reuland, for Plaintiff.]

FRANK J. REULAND called as a witness for plaintiff, and testified among other things as follows:

I am an employee of Fairbanks, Morse & Com-

*Page-number appearing at foot of page of original certified Record.

†Original page-number appearing at foot of page of Bill of Exceptions as same appears in Certified Transcript of Record.

(Testimony of Frank J. Reuland.)

pany, and under instructions went to defendant's ranch in Riverside County on April 1, 1912, to demonstrate the oil tractor in question. I was accompanied by A. McDearmon, another employee. We met the defendant and Ferguson at Alessandro station, on the Santa Fe Railroad, where we unloaded the tractor, leaving the station about 2 P. M., and under its own power proceeded to the ranch of defendant, which we reached about seven o'clock that evening. The next morning we got the engine ready and drove it into the field under defendant's directions after plows had been attached, and started to plowing. I don't remember how many acres we plowed, but we put in the day plowing moving from one field to another. I was not personally present the full day, but McDearmon was. The defendant was present most of the time and McDearmon instructed him about the starting of the engine and the stopping and the oiling and about the different parts. On the 2d day of April McDearmon started with the engine and plowed all day, commencing between seven and seven-thirty in the morning and working until about sundown. [49—3] Nelson was present most of the time and his employee, Ferguson, was present all day. We worked until 4:25 o'clock that evening, which hour I remember distinctly, since we were going to drive to Los Angeles, and I pulled out my watch to see. Before we left, we talked with Nelson, asking him whether he was satisfied with the engine, and whether he thought he could get along with it and whether he desired

(Testimony of Frank J. Reuland.)

any further instructions, and whether there was any reason why we should not leave, and he first asked his engineer and then told us there was no reason so far as he knew why we could not leave, because everything seemed to be running satisfactorily. I don't recall the exact words that were spoken, but that is the sum and substance of the conversation, which was between Nelson, McDearmon and myself and Ferguson was present. I had spoken to Nelson earlier in the afternoon and told him that our time was up that evening, and that everything seemed to be running all right and we would like to get away that evening if we could, and he told us, that if everything continued to run as it was, we could leave. I don't remember the very words he used, but he said the engine was working nicely then, and if it continued that way the rest of the afternoon, he did not see why we could not get away, and he made no objections to our going. He did not say that he was not satisfied with the test, nor was there anything said at that time about the efficiency of the engine. He made no complaint about this and found no fault with the test, or the demonstration, and did not ask us to remain longer for a further test.

Cross-examination.

There might have been some statements made at that visit about putting wider bands on the large wheels of the machine. There was in regard to some very sandy and gravelly land Nelson had on the hillside, [50—4] and we thought if he wanted to

(Testimony of Frank J. Reuland.)

plow that by putting on extensions, but there was nothing said that we thought he should have them. If he wanted to spend the money we had them to sell. We were there right after a rain and the wheels sunk into the ground in some places. I know that they did furnish these extensions for those big wheels, but don't know whether they charged him for them. I went to Lake View about eight o'clock in the morning and got back about three P. M. and don't know anything of what happened or what was said while I was gone. There possibly may have been some conversation with me about the wider bands. I won't say that I didn't suggest the putting on of those wide bands. I don't know how much was plowed the first day they worked in the fields. On the 3d of April we stayed until 4:25 P. M., but don't know how far the tractor traveled during that day. They had on 18 plows, but dropped off 6 a part of the time. They thought possibly it was a little more load than there should be on a wet place. I don't know how long we had 18 plows on. This was called a 30-60 horse-power tractor. The 30 represents the draw-bar pull, which is a surplus power that you have left after the engine moves itself.

Redirect Examination.

There was some difference in the topography of Nelson's ground. Some of it was gravelly and sandy.

Recross-examination.

We have sold a good many tractor engines. I

(Testimony of Frank J. Reuland.)

don't know when I sold the first 30-60. I never went on a 30-60 oil tractor before then, and this was my first experience with this class of engine. I never showed one before except in our yards in Los Angeles. [51—5]

[Testimony of Stanley J. La Port, for Plaintiff.]

STANLEY J. LA PORT, a witness called for plaintiff, testified as follows:

I am cashier of Fairbanks, Morse & Company. I have the three notes in my possession executed by the defendant. These notes have not been paid, nor any part of them, nor the interest on the same.

[Testimony of A. McDearmon, for Plaintiff.]

A. McDEARMON, a witness for plaintiff, testified as follows:

I am an employee of Fairbanks, Morse & Company, and worked in the factory of plaintiff at Beloit, testing nearly all kinds of engines they made at that time, and since coming to Los Angeles have been engaged in erecting and testing engines, having been employed in Los Angeles for nine years. I have built engines from the ground up. Can take them apart and put them together again and know how to start and use them and to determine their efficiency for performing the work for which designed. Am familiar with how fast an engine should be operated and under what conditions as to soil and know how such an engine should be operated under certain conditions. I went with Reuland to defendant's ranch to instruct defendant in regard

(Testimony of A. McDearmon.)

to operating the engine. We arrived there April 1, 1912. After unloading the engine from the depot platform and filling the same with fuel and oil, we drove it to the defendant's ranch, arriving there at seven o'clock P. M. The next morning between seven and eight o'clock, we started up the machine, attached plows and pulled it over in the field. The defendant furnished the plows himself. The 2d of April we operated the engine all day except during the time we stopped on account of the plows and because of getting into wet places. No stops were necessary because of any defect in the engine or the operation of it. It pulled the plows and the only delays were due to outside causes. We returned to defendant's ranch the next day and went out and started the engine and plowed. During that day I had Mr. [52—6] Ferguson operate the engine probably half of the time. Mr. Ferguson was an employee of the defendant. I showed him about the oiling, about the fuel, how far to open his throttle valve, how to start his engine, and told him about keeping it up and different things to do, explaining the mechanical construction to some extent, but more especially the operating. We remained until half-past four or five o'clock. That was our second day, and we wanted to get into Los Angeles. I asked Nelson whether he thought he would have any trouble with the engine, and if he thought he could operate it all right, and he turned to Ferguson and asked Ferguson if he thought he understood it all right, and he said he did, and he says, "All right,"

(Testimony of A. McDearmon.)

and we bid him good-bye and got into the machine and went. He seemed to be satisfied with the operation up to that time. I cannot tell his exact words, but remember the substance of what he said. I asked him if we could go off with the machine when we were ready to go, and told him that we did not think he would have any trouble with the machine, and he said he guess not, and he turned and asked Ferguson if he could handle it, and Ferguson said that he thought he could unless something new came up, and then Nelson told me it would be all right, that we could go. [53—7]

I know what bands or extensions on the wheels are. They are a necessary part of the engine only on very loose ground and were not necessary for the operation of the machine itself, only to hold the machine up and hold it from slipping.

Cross-examination.

I, myself, said to Mr. Nelson that if we were going to plow in that loose stuff on the hills that I believed the extensions would be a good thing. They were about 16 inches wide. I did not tell Nelson that we would have to hurry to Los Angeles to get an order off by telegraph to get them into a car that was about to be shipped, and did not hear any such conversation. I did not tell him that the company would furnish them. It had been raining some before we got there. We got into mud so bad we had to get rails and bars to stuff under the wheels. I was running the engine which worked all right. I had told Nelson that the wet part of the ranch would

(Testimony of A. McDearmon.)

need those extensions in order to complete the machine or do the work; that I thought that would help. The first day that we started the machine we were working on a forty-acre piece and went a little more than once around in the forenoon, making several stops. When I say the engine worked all right, I mean that the engine ran up to speed. I never made any test at any time to show the mileage the machine was accomplishing or the exact distance it was making in any definite length of time. I had demonstrated with that tractor several times, but not in a field. This was the only one I had ever tested in the field.

I never saw a 30-60 tractor with plows attached being operated before that time. This was the first engine that I had anything to do with of this particular type and power that they had ever shipped out from the establishment. We moved to another field in the afternoon, but I don't [54—8] remember whether we made a circuit or not that day. We got into mud and into loose sand on a hillside and had quite a little trouble getting out, and used brush and cactus under the wheels to try to get them over that place. I think we got clear around, but I am not sure, that day.

The COURT.—When do you claim, Judge Collier, that notice was given to plaintiff that this engine was inadequate for the work the defendant wanted it to do?

Mr. COLLIER.—Our testimony will show that it was that very same day.

(Testimony of A. McDearmon.)

The COURT.—That is your position?

Mr. COLLIER.—Certainly.

That is the very first attempt they were making, and before they got away from there this extension was to be sent for to keep that on the ground and the pleadings practically so allege.

The witness further testified as follows: I put the extensions on the engines about six weeks later. On the second field we had three plows part of the time, and on the second day we dropped one plow. These details are not very fresh in my memory. The reason we gave to Mr. Nelson for going away was in order to get back to the city and get on some other job. In making the trip from Alessandro to the Nelson house we stopped twice; about fifteen minutes the first time and about five minutes the second. It took us pretty close to five hours to go that eight miles on the road.

Redirect Examination.

On the soft ground the weight of the engine alone would go down three or four inches without plowing, and with the plows behind the wheels would spin.

Recross-examination.

The machine in running from [55—9] Alessandro to the house was run most of the time on the high gear, and it is supposed to go faster on the high than on the low gear.

[Testimony of R. S. Ferguson, for Plaintiff.]

R. S. FERGUSON, a witness for plaintiff, testified as follows:

(Testimony of R. S. Ferguson.)

I have been employed by the defendant, and was working for him in March, 1912, until June of that year. The engine in question was used by us all day of the third of April. I was present when McDearmon and Reuland left that evening and heard some conversation. They asked Nelson if he thought he could get along all right, and he asked me if I thought he could run it, and I thought he could unless something turned up that I did not know anything about. Nelson then said to them, "All right," addressing his remarks to Reuland and McDearmon, and they told him they guessed they would go. After they left and until June sometime, during which time I worked for Nelson we plowed about six or seven hundred acres of land except some washes, the amount of which I do not know. He used horses all the time on other lands, but I don't know how much was plowed by the horses.

Cross-examination.

Just before McDearmon and Reuland left on the afternoon of the second day, I saw Nelson and Reuland talking together on the corner, but did not hear what they said. I did not hear them talking about any extensions on the bull wheels. I heard Nelson say something about putting extensions on. He told me.

The machine broke after we had gone about half of a quarter after Reuland and McDearmon went away. The gear shaft broke and after two or three days McDearmon fixed it. Then the differential shaft broke and it took two or three [56—10, 11]

(Testimony of R. S. Ferguson.)

days to fix that. It broke again and we had to stop, and it was probably a week before that shaft came back. There were some new bands put on at the time that the new shaft was sent out to take the place of the broken one. While the machine was idle waiting for these things I was plowing with horses. While the plows were in operation, and when the tractor was not in the mud and was moving over the ground it did not make the same time that the International made upon which I worked before. The bull wheels of the machine settled into the ground and made quite a furrow across the second piece that we worked on, and that continued during the two days that they were there. After the land got in better condition I don't know as I made any better time than when the ground was wet.

Redirect Examination.

I heard the talk between Nelson and McDearmon just before they left, but did not hear them talking off to one side. After the new steel shaft was put in the engine it worked all right, and the only trouble I had with it was with the batteries, and after I got a new shaft I did not have any more serious trouble, and most of the plowing done with the engine during the time I was there was done after the last steel shaft was put in.

Recross-examination, by Mr. COLLIER, for
Defendant.

While I was operating that machine it never traveled and plowed under any conditions that I used it over a mile and a quarter an hour.

(Testimony of Henry Reuland.)

Objected to by plaintiff because incompetent, irrelevant and immaterial.

Objection overruled. Plaintiff excepts upon the ground that same is incompetent, irrelevant and immaterial. [57—12]

Exception taken and allowed.

Statement by counsel for plaintiff that the notes provide for an attorney's fee of 10% and an offer made to introduce testimony as to the work done by the attorneys.

The Court inquired if there was any controversy as to the fee and counsel for defendant stated they were satisfied with a fee of 10%, and the Court stated that this would be ordered by the Court, if judgment rendered for plaintiff.

[Testimony of Henry Reuland, for Plaintiff.]

HENRY REULAND, a witness called by plaintiff, testified as follows:

I am employed by Fairbanks, Morse & Company, and am acquainted with the defendant and am a brother of the witness who testified this morning. My name is on the contract and I arranged the sale of this engine. I do not know of any steps ever being taken by defendant to load the engine on the cars for the purpose of returning it to Fairbanks, Morse & Company, and the defendant never made our men any offer to load the same on board the cars.

I saw the defendant the first week in June, 1912, and had a conversation with him in regard to the engine, and he stated that she was a dandy. "You

(Testimony of Henry Reuland.)

can't have her back if you want her." He said this in his back yard at Moreno.

Cross-examination.

Witness is handed a folder or circular by counsel for defendant entitled on the front page, "Fairbanks, Morse & Company, 30-60 Horse-Power Oil Tractor," and asked whether he used this circular in the negotiations to which he answered that he did. [58—13]

**[Testimony of Frank J. Reuland, for Plaintiff
(Recalled).]**

FRANK J. REULAND, recalled, testified as follows:

As a mechanic and engineer, I have had fifteen years' experience, both in operating and in superintending work, and know the action of distillate as a fuel, and know what is required as to oil and water and am familiar with the speeds and how they are regulated by the gears, and know the horse-power of an engine like the one in controversy and how the same is determined, and know that the engine which was delivered to Mr. Nelson was the engine specified in the contract as being a 30-60 horse-power Fairbanks-Morse oil tractor. I know how much land the defendant had to plow and the conditions of the soil and of the efficiency of the engine, and the engine was capable of plowing the thousand acres which he told us he had to plow.

This engine, if pulling plows enough to plow a strip fifteen feet wide, would plow at the rate of fifty acres per day of 24 hours, and there are 44,560 square

(Testimony of Frank J. Reuland.)

feet in an acre. It would amount to 43 acres per day plowing a strip 12 feet wide.

Cross-examination.

I don't know that there were any evidences of either 43 or 50 acres having been plowed during the first day that we worked in the field, or the second day. My estimate of what could be plowed is made under ordinarily good conditions traveling one and three-quarters on the low gear and two and one-half miles on the high gear, and either gear suitable to operate it. I couldn't swear that the engine out there ever went as high as a mile and three-quarters in an hour because I didn't have a speedometer or anything to indicate the exact mileage in that way. I couldn't say that I ever [59—14] saw it on that land go any faster than a mile and a quarter an hour when it was trying to plow. I never timed it or had any specified distances. I don't know who ordered the bands or extensions; that is out of my jurisdiction. The weight given in the shipping receipt of this implement is 28,400 pounds.

The engine did not sink in the ground any more than ordinary, and I had not come to the conclusion that the engine in order to do that work had to have 16-inch extensions on each bull wheel and I did not suggest this to Mr. Nelson, or that we would send for them, and did not tell him that we had to leave in order to get in and get a telegram to Chicago to get them.

[Testimony of J. M. Nelson, in His Own Behalf.]

J. M. NELSON, the defendant, sworn on behalf of the defense, testified as follows:

I reside in Riverside County. In buying this engine, I negotiated with Henry Reuland.

Q. I show you a circular marked exhibit "A" for identification. Did he use that document in connection with the negotiation?

Objected to as incompetent, irrelevant and immaterial and because no claim in the pleadings that there were any misrepresentations.

The COURT.—The question is what were the needs, and was the engine capable of doing that work. I am not inclined to shut out any testimony, but would give it no weight if I find it is not competent.

Objection overruled. Exception. [60—15]

Witness identifies circular as the one used.

And testifies that he expected to summer-fallow fifteen hundred acres, or a little better, which should be done as near after January 1st, as possible. Should be done by May 1st or before. I wanted the tractor for drawing a combined harvester as well as plowing. I expected to run the engine night and day in order to get the land plowed before the moisture got down. The first day we pulled the machine out into a forty acre field where my man had taken some plows; six-gang plows, and three of them, with eight inch shares. It was a little after nine when we got started, and a little after half-past twelve when we got around the forty acre field, having traveled

(Testimony of J. M. Nelson.)

about one mile. The ground was wet and we had to pull around into the street to get around a wet place. There had been about an inch and a half to two inches of rain. The bull wheels made deep impressions on the land, perhaps from four to six inches deep. I called Reuland's attention to it, and he said we could overcome that by putting extensions on. He said there were twelve, fourteen and sixteen inch extensions, and said, "We will get the weights." Said they would hold the engine up off the ground and would give it tractive power, because the engine going down into the dirt could not go as fast as it could the other way. We went to another field in the afternoon and made one and a half miles with the tractor; part of the time with the plows jacked up with their rear ends out of the ground as far as possible. It took us about two hours to go the mile and a half. The soil was sandy on the east end and on the west end it was a black heavy loam. The sandy soil is tillable soil. The next [61—16] day we found we had to drop one six gang plow and work the rest of the day with two six gang plows, using two gangs with six shares each would give a strip eight feet wide. We were cutting a 180 field in two, going up about a two per cent grade. We found that the engine slipped some and backed up, and we would throw stones under or a cactus and that sort of thing, and then we dropped one of the plows. We had a great deal of trouble on the second round with the engine going down into the dirt from four to ten inches in the sand. This sandy land is tillable and

(Testimony of J. M. Nelson.)

has raised crops. The next day the tractor traveled from five and a half to six miles and in that distance we plowed about eight acres. On the first field of forty acres the first day we had plowed about an acre and a half. That evening, and about the time we quit operating on the last day, I had some conversation with Reuland at the northwest corner of the field. I went out to his automobile and he said they were going to leave.

I said to him, "You mean that you are going, but you are going to leave Mac," and he said that he would have to take Mac back to do some work on a ninety horse plant somewhere, and that he had to get home in order to telegraph to the factory where they make these extensions to get them on a car that they were loading so that the extensions could be gotten out here without any delay to be put on this tractor engine to hold it up on the ground so it could do the proper work it was sold to me to do. We had some further talk when we got back to the tractor.

Q. What was said then?

A. He said something about; he told McDearmon. He asked him if Ferguson could run it and Ferguson said something to me about running it and I did to him. [62—17]

Q. Do you remember what you said?

A. I asked Ferguson if he thought he understood how to run the machine, and he said he did, so they started up and McDearmon started the machine up.

Q. Was there anything said about your acceptance of it?

(Testimony of J. M. Nelson.)

A. Nothing said about my accepting the machine. This was about an hour after he told me they must hurry off.

The extensions came. I never wrote any letters or made any order in regard to them. McDearmon put them on. It was a little after four o'clock on the evening of April 3d, about 4:30 when they left. Reuland showed to me by putting on those extensions, measuring on his automobile head about how far it would be and that would give the wheels so much more bearing on the ground that they would have more tractive power so the engine could make better progress, and during this conversation he complained about my plows and said I should have disc plows. I did not buy any disc plows until later. From his asking my man if he thought he could run it, I understood I was to go ahead and do the best I could with the machine until he got the extensions there which would be about ten days. They came on the 11th of May, I believe. They never demanded pay for them or sent me a bill for them. Henry Reuland came to my ranch two or three days and looked the engine over where it was standing in the field and asked if I would pay the freight if they would send the extensions for the wheels, and I told him I would pay the freight from Los Angeles. The extensions weighed something better than 2400 pounds, and this was additional to the original weight of the machine, which was 28,400 pounds. After the men left that night, we operated the engine for about twenty minutes when it broke down. One

(Testimony of J. M. Nelson.)

of the boxings broke and the gear casing dropped, due to a bolt breaking which holds up [63—18] one of the transmission shafts. I sent word to the company and they sent a man there to fix the engine. On the 16th of April, we began again and used it until the 19th, when the differential shaft broke, and the company again sent a man to put in a new shaft, and they put it in between the 26th and the 29th of April. It broke again in about a week and I telephoned the Company, and on May 10th, they sent a man out. The extensions came about that time and at the same time they put in a vanadium steel shaft, and on May 17th, the engine was ready for use again. We ran it over to another field and began operating it, but it would not make any better progress than it did before, but we continued to use it until the 28th of May, when I got some disc plows and put them on. Until the extensions were put on it made about a mile and a quarter per hour. The men went away on the afternoon of the 17th, and we continued to operate the machine and its speed was $5\frac{1}{2}$ revolutions of the wheel per minute or a little better than a mile and a quarter on an average.

Q. What was the speed of that engine as it was stated to you in your negotiations?

Objected to as incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled.

Counsel for plaintiff excepted, which said exception was taken and allowed.

A. The engine was told to me to be able to make

(Testimony of J. M. Nelson.)

two miles an hour, plowing with 18 plows, except in the worst places, and then it was supposed to go a mile and three quarters. (The witness continued:) I put on disc plows and attached them to the tractor. Mr. Ferguson drove the engine to the field and said it would not do any better. I went the next morning and noticed the action of the machine with the discs on and it [64—19] was no better than it was before, so far as I could tell by looking at it. They gave me to understand that the tractor would have plenty and ample power to pull the separator, I having told them the machine would have to travel two miles an hour at least. I told him at that time it would have to do that work. If the separator does not travel that fast or better there is not enough air to carry the chaff out and you get grain and straw together. I have been harvesting for seven years and the least I have ever known a combined harvester to run was two miles an hour, and in the morning it must run faster than that. I so stated to Henry Reuland. Up to the time the disc plows were put on, the 28th of May, the difference in speed was the difference between $5\frac{2}{5}$ and $5\frac{1}{2}$ revolutions of the bull wheels per minute. There was no perceptible difference in speed on the ground. I bought the disc plows at an expense of \$438.00 after they had told me I should get them. After they were attached Ferguson drove the machine to the field and when he came back he said it didn't do any better. I saw them the next morning and it was no better than before. I went to the house and telephoned Fairbanks,

(Testimony of J. M. Nelson.)

Morse & Company before noon and asked that they send Mr. Reuland to come and see about it, and they said he would. I found his card under my door on the 13th of June. I saw him there in person on Sunday, June 23d. Mr. Reuland was not at my ranch the first week in June, and I never had a conversation with him in which I said that the tractor was a dandy; "You can't get it back if you want it." No such conversation took place at any time. I received a letter dated June 11th from the company reading as follows:

"Los Angeles, Cal. 6/11/12.

Mr. J. M. Nelson, Moreno, California.

Dear Sir: We regret that our Mr. Reuland has not been able to reach you as yet. From a letter we received [65] from him this morning we understand he has been spending his time around San Bernardino and Redlands, but as he contemplates spending his time in Perris Valley this week, we hope before you receive this letter, he has visited you.
* * * We sincerely hope our Mr. Reuland will be able to suggest a remedy for the magneto, so there will be no further trouble from this source.
Signed—FAIRBANKS—MORSE & COMPANY."

Said letter was introduced in evidence as Defendant's Exhibit "C."

Counsel for defendant requested counsel for plaintiff to produce letters written by defendant to plaintiff on June 4th and 7th, pursuant to a demand for the production of same made in writing before the

(Testimony of J. M. Nelson.)

trial. Counsel for plaintiff stated that he did not have them.

(Witness continued:) On the 4th of June I wrote them and wondered why the engine did not travel faster, thinking it did not get the proper explosion and combustion, or that the trouble was with the magneto. I had telephoned on the 29th of May on the 4th of June I wrote and complained about the engine not making the proper time, and on the 7th of June wrote them again, and the answer was that Mr. Reuland would come, or they hoped he would. This was after I was trying to work the engine with the new discs that they suggested. Up to this time I did everything they suggested, even to the expense of buying \$438.00 worth of plows. I wrote this letter dated June 14, 1912, produced by the plaintiff here as follows:

“Moreno, June 14, 1912.

Fairbanks-Morse & Company.

A short time ago I bought three 4-gang disc plows in order to do better plowing and make a lighter draft for the engine, and have looked for your Mr. Reuland to come that he might see it work out. As he failed to make his appearance, and [66] as it will not make the speed required for our work, I have stopped the work, and until it will make two miles an hour, with the load I have been drawing, I am ready to help load it on the cars according to contract. I made no complaint heretofore, as your men assured me that if I only had disc plows the engine would go all O. K. For the first six weeks I was

(Testimony of J. M. Nelson.)

annoyed with breaks and delays. However I could overlook this if the engine would make the time it was claimed to do without making more than 375 revolutions a minute. You know also that it is from two to three tons heavier than claimed to be. To do harvesting successfully the engine must travel two miles or more an hour so that the harvester may handle the grain; and I want the engine for harvesting as well as for plowing.

Yours truly,

J. M. NELSON."

(Witness continued:) It had gone from a mile and a quarter to a mile and a third by actually measuring the revolutions of the wheel. I saw readily that it could not pull a harvester, so I refused to do harvesting jobs. The engine pulls about the same in harvesting as in plowing, that is with 18 plows.

The witness is handed a circular headed, Fairbanks, Morse & Company, 30-60 horse-power oil tractor, and his counsel asked him who gave him the circular.

The witness testified as follows: H. J. Reuland gave me the circular the latter part of February, 1912, when we were negotiating about my purchasing one of these machines. The circular was offered in evidence by counsel for defendant. Objected as irrelevant, incompetent and immaterial and on the ground that these negotiations were had prior to the reducing of the contract in writing.

The COURT.—The objection will be overruled.

(Testimony of J. M. Nelson.)

Exception taken by plaintiff and allowed.

Counsel for defendant offered the circular in evidence, to which counsel for plaintiff objected, which said objection was overruled, and which ruling is now assigned as error, and an exception was taken by counsel for plaintiff and allowed, and the circular offered in evidence as Defendant's Exhibit "E."

I received a letter from the plaintiff dated June 19th, in reply to my letter of June 14th, and on the 20th of June I wrote to the plaintiff as follows:

"Moreno, June 20, 1912.

Fairbanks-Morse & Company, Los Angeles.

Gentlemen: I have just received your letter of June 19th in answer to mine of the 14th inst., and it is quite apparent to me that your construction of your contract is very different from my understanding of it. I do not find any provision in the contract which required me to return the machine or offer to return it in five days after delivery. I am still willing to meet any one you may send to Alessandro to assist me in loading the engine at that place, and I am willing to pay the freight on it to Los Angeles in accordance with my agreement, but as I understand your letter of the 19th instant this proposition will not be considered by you. If you have changed your mind at this time in regard to the matter, and will so advise me when your men will be at Alessandro, I will be there with the machine and with those necessary to assist in moving it and prepared to pay the freight. Otherwise the machine is subject to your order, and you are welcome to take possession of it

(Testimony of J. M. Nelson.)

at any time. The machine has not proved adequate for my work and does not come up to the representations made to me by your representative at the time of the sale.

Yours very truly,

J. M. NELSON."

Said letter [68] was offered in evidence and marked Defendant's Exhibit "H."

I received a letter July 3d demanding payment of one of my notes, and on July 5th I wrote the plaintiff as follows:

"Moreno, California, July 5, 1912.

Fairbanks-Morse & Company, Los Angeles, Cal.

Gentlemen: Yours of July 3, 1912, just received and contents noted. I refer you to my letter of June 14, 1912, and when this demand is satisfactorily proven by proper test, then I will talk to you in regard to settlement. Your Mr. Reuland came here June 23rd and removed valves, and after two or three days returned and put them in, drew the engine to the field and said he expected to be back the following Friday or Monday with a man to test it; but at this writing I have not heard from him or seen him.

Yours truly,

J. M. NELSON."

This letter was offered in evidence, marked Defendant's Exhibit "J."

Henry Reuland took some valves away from the engine on Monday, June 23d, and the following Wednesday came back and put them in and promised to come back and test that engine satisfactorily to me.

(Testimony of J. M. Nelson.)

He was the last person who came from the company in connection with it, and told me that Fairbanks, Morse & Company were going to make that engine proper.

I had a talk with Reuland prior to signing the contract about a traction engine used in the neighborhood. It was a Caterpillar. It was in the latter part of February.

Q. Did you call his attention to that machine, and what it was doing?

Objected to as incompetent, irrelevant and immaterial, and made prior to the signing of the written contract. [69]

The COURT.—Suppose it should transpire that Reuland, who by the way is an agent of the company, suppose it should transpire that they had in a lawful way changed the terms of the contract, the evidence cannot be excluded as incompetent because the contract might have been legally changed by a competent person.

Moved that the evidence be stricken out unless connected, unless defendant shows that the alleged modification was made by an authorized agent of the plaintiff.

The COURT.—Motion will be denied.

To which ruling counsel for plaintiff excepted, and which ruling is now assigned as error, and said exception being duly taken and allowed.

A. It was a comparison of what his machine would do with what I was acquainted with. I told him that machine went at the rate of 35 acres in half a day,

(Testimony of J. M. Nelson.)

or 70 acres in 24 hours. He said, "If our 30-60 can't plow as much as the Caterpillar, I will give it to you." The Caterpillar is a 60 horse-power machine.

Q. Did you rely on his statements as to what that machine would accomplish?

Objected to as incompetent, irrelevant and immaterial, and a conclusion of the witness.

The COURT.—It is a conclusion of the witness, yet, it is an element of his defense, and the objection is overruled, which ruling is assigned as error and exception was at the time duly taken and allowed.

Counsel for plaintiff enlarged the objection so that it might appear that the testimony was incompetent under the pleadings, which further objection was overruled, and which ruling is now assigned as error and exceptions were taken at the time and allowed.

[70]

A. According to what he showed me in the specifications, and the way he represented the machine, I expected the machine to do just what he said.

Moved that the answer be stricken out as not responsive.

The COURT.—Let it go out.

Q. What did you rely on with reference to—what representations?

The COURT.—I am going to allow all that testimony to come in, but defendant is assuming a burden of proof that the contract does not call for, to which ruling counsel for plaintiff excepted at the time, and its exception was allowed.

In my negotiations, I relied upon these representa-

(Testimony of J. M. Nelson.)

tions before signing the contract, the representations that it would do so many acres and travel so fast and do a certain amount of work. I told Reuland that I was purchasing the machine for harvesting also and would have to have a machine which would do two miles or more an hour. I stated to Reuland that I had 1,500 acres to summer fallow. Up to the third of May, I plowed 110 acres with this machine, and, after the 17th of May, I plowed 280 acres, and after I got the disc plows, I plowed 195 acres more, making a total of 585 acres up to June, 1913. I had 200 acres of my own to harvest that season, and had enough to harvest for my neighbors to keep me going until September.

Cross-examination.

The tractor did not travel as Reuland said; it went down in the ground, and couldn't do the work; I would have told Frank Reuland the evening of the 3d of April that I was dissatisfied with the tractor if it hadn't been for the talk about the extensions. He led me to believe that the engine would do the work when the extensions were on. I continued to operate the tractor because they told me to go ahead and do the best I could with it. Frank Reuland said, "Go ahead, [71] and do as much as you can with it; we will get the extensions and put them on." They said they were going to make it what they sold it to be. I got it to do my work, and if I couldn't get it done when I wanted it done, I did the best I could. If it wasn't summer fallowing, it was fall plowing. Their men said if I had the disc plows the engine would

(Testimony of J. M. Nelson.)

do the work. I called the salesman's attention to the road speed given in the circular, and told him I wasn't buying it for road work. Henry Reuland said it would plow two miles in the field on the high speed and a mile and three-quarters on the low speed. I would have told the man to take the machine back if he hadn't said something about the extensions on April 3d. He told me the ground was too wet. The men left contrary to my wishes. I requested that McDearmon be left, but he said he couldn't, and that they would send somebody back when the extensions came. McDearmon and Roy Ferguson might have heard this conversation if the machine wasn't running. Afterwards we had a talk in the presence of McDearmon and Ferguson, and Ferguson said he thought he could run the engine.

After the vanadium steel shaft was put in, I have not had any breakage of the shaft, and the engine has been all right, so far as the shaft is concerned. I knew promptly after repairs were completed on the 17th of May, that the machine did not make any better speed than it had before. I saw that the engine wasn't going any faster than before. I then bought disc plows and got them on in eleven days. You can't do that in five minutes. They were ordered shipped to Alessandro, hauled to my ranch, and erected in eleven days. I ran it from the 28th of May, when I put the disc plows on until the 13th of June, plowing with it all the time. I telephoned them on the 29th that the engine wouldn't do what it was represented to do; that if they could make the engine

(Testimony of J. M. Nelson.)

satisfactory, I wanted it. [72]

Redirect Examination.

I had complained in my telephone message on May 29th, and in the letter of June 4th and June 7th, and on the 14th of June. After the extensions were put on they never made a two-day test of it. I requested it. I took no steps to cancel the contract until the 13th of June, when I wrote a letter of that date.

[Testimony of Frank Dickerson, for Defendant.]

FRANK DICKERSON, a witness for defendant, testified as follows:

I was employed by J. M. Nelson about May 15th last year as night engineer. I saw the engine two or three weeks before that when it was broken down. Afterwards, when I went to get the job, I saw it in operation, and it was going a little better than a mile and a quarter with plows attached. After the extensions were put on, I could see no difference in the speed. We would run to midnight Saturday night and lay over until midnight Sunday in working. Otherwise it would run every night. I tried to run it on the high in the field with the plows lots of times, and it would choke itself down, and drag its power so low that it would miss; it wouldn't drive it through. After the shaft was repaired and the extensions put on by McDearmon, he told me that Nelson wanted him to stay two or three days, but he had lots of work and didn't see any use of staying. After the disc plows were put on there wasn't much difference. Where the disc struck hard ground, and wouldn't cut he got speed up a little, but when it was scratching

(Testimony of Frank Dickerson.)

the ground it wouldn't run very fast. We plowed around a 160-acre field, being less than two miles around, on the low gear and made it in an hour and three-quarters. I couldn't run the machine on the high.

Cross-examination.

I couldn't estimate the acreage we made because every once in a while we would strike a sandy place where we couldn't pull the plow and couldn't [73] pull the engine out, and we would go around those places, and we would cut the acreage down a great deal. A Caterpillar engine would not get stuck in a place like that.

Redirect Examination.

When McDearmon tried to run the machine on the high the engine choked itself down, because we couldn't shift our gears to get it out, and McDearmon had to get in the machine and pry the gears apart so that he could shift it. A combined harvester is pulled by the draw-bar of the engine, and the engine has to travel at least two miles an hour to do the work, and it is better work at two miles and a half.

[Testimony of C. W. Cell, for Defendant.]

C. W. CELL, a witness on behalf of the defendant, testified as follows:

Direct Examination.

I am an implement dealer; have been in the business two years. Have bought and sold farming implements and demonstrated the same. I saw this tractor before the extensions were put on, operating

(Testimony of C. W. Cell.)

with plows in the field, and it was making about a mile and a quarter an hour. I saw it after the extensions were on running without the plows in the ground, and it was making about a mile and three-fifths with the plows jacked up. I saw it with the disc plows attached in operation, and it was making about a mile and a quarter per hour. I have timed combined harvesters in action and any traction engine attached to a harvester must run two miles an hour or better.

Cross-examination.

I sold Mr. Nelson the disc plows that were put on the 28th of May.

Rebuttal Testimony.

[Testimony of Frank Reuland, for Plaintiff (in Rebuttal).]

FRANK REULAND, a witness for plaintiff, testified as follows:

I heard the defendant's testimony in relation to the conversation on the evening of April 3, 1912, in which [74] he stated that I promised to secure for him certain extensions on the bull wheels. I did not make any such a promise. I did not refuse to leave McDearmon on the job, stating that he was needed on a 90 horse-power job somewhere else. I did not state to him that I would have to leave for Los Angeles that night to telegraph for the extensions. I did not promise to have the extensions on his engine ready for use within ten days, because that would be impossible, the factory being located at Beloit, Wis-

(Testimony of Frank Reuland.)

consin. I did not state that there was a car already loaded at Beloit, ready to be shipped; I have no authority from my house to add to the equipment furnished to customers. I did not promise the defendant to return to Los Angeles and endeavor to secure these extensions for him. There was no talk at that time about extensions on the wheels preventing the depressions in the ground. The only talk about extensions was whether they would be any benefit on the sidehills where it was sandy and gravelly. I think Nelson first mentioned it. He asked whether they would be any improvement. I know extensions were put on by my company at the time the vanadium steel shaft was put on, May 17th.

Cross-examination.

Increase of the weight of the engine without increasing power reduces the draw-bar pull 100 pounds for every added ton of weight. The total draw-bar pull of this tractor is 9,000 pounds.

[Testimony of Henry Reuland, for Plaintiff (in Rebuttal).]

HENRY REULAND, called in rebuttal testified as follows:

I was at the defendant's place on the 23d of June, 1912, and replaced certain valves in his engine which had become pitted from neglect and lack of oil, and needed regrinding. After the valves were replaced, the engine worked perfectly. I ran the engine up into the field for him over [75] a mile. It worked perfectly. I told the defendant the engine was all right, and to go ahead and use it. I never repre-

(Testimony of Henry Reuland.)

sented to the defendant at any time that the engine, pulling two or three gang plows of six shares each would make two and a half miles per hour in the high gear, or a mile and three-quarters per hour on the low gear, and never made any representations as to what the engine would do in the field, pulling plows, because it would be impossible for anybody to tell what the slippage would be. I gave him what the catalogue says, and that is all I know about it. I think he told me he wanted to pull a harvester. I had no authority from my house to alter or change or add to any contract previously entered into with customers.

[Testimony of A. B. Cooks, for Plaintiff (in Rebuttal).]

A. B. COOKS, called in rebuttal for plaintiff, testified as follows:

I am an implement dealer and am familiar with a combined harvester and separator, although I have never operated one. I know the mechanism to some extent. The speed of the separator must run about so many revolutions on certain grain to do proper work, and that can be regulated by pulleys on the gears on the cylinder. The pulleys must be made to correspond. I should think that a harvester operating at a speed of one and three-quarters miles per hour could have the gears and pulleys so adjusted as to make the separator operate efficiently.

It would seem to me that if you were going to reduce the speed of your machine your threshing machine is not going the proper speed. I am not fam-

(Testimony of A. B. Cooks.)

iliar with the combined machine. What I am familiar with is a stationary machine, and the regulation I have been speaking of was done on a [76] stationary machine and not on a machine in motion. I am not familiar with a harvester in motion or with the method of regulating a combined harvester in action.

**[Testimony of Henry Reuland, for Plaintiff
(Recalled in Rebuttal).]**

HENRY REULAND, being recalled, testified:

I am the agent who made this sale to the defendant. I never made any representations to him prior to the sale that this engine pulling plows in the field would make a speed of two and one-half miles per hour.

**[Testimony of O. L. Stengel, for Plaintiff (in
Rebuttal).]**

O. L. STENGEL, called on behalf of the plaintiff, testified as follows:

I am assistant to the manager of Fairbanks, Morse & Company. I know that there was a 30-60 tractor sold to Mr. Nelson. I ordered extensions put on this machine somewhere after the 5th of April by request of Henry Reuland.

**[Testimony of Frank Reuland, for Plaintiff (in
Rebuttal).]**

FRANK REULAND, called in rebuttal, testified as follows:

I never made any representations to the defendant as to what the engine would do in the field as to

(Testimony of Frank Reuland.)

speed. Speed was never mentioned. I never demonstrated to the defendant on my automobile head about the width of the extensions, or that the engine would make any better progress with extensions.

There being no further testimony, the case was closed, and counsel proceeded with the argument.
[77]

Assignments of Error.

Counsel for plaintiff now assigns the following errors of law:

I.

The Court erred in finding for defendant, because

(a) The evidence produced was insufficient to justify the findings and judgment of the Court.

(b) The findings of the Court are contrary to the evidence and not supported by the testimony.

(c) The judgment is not supported by the findings, and is contrary to the evidence.

(d) The judgment is against the law.

II.

The Court erred in permitting testimony permitting the alteration of a written contract made by the parties, said ruling being contrary to the statutes of the State of California.

III.

The court erred in finding that there was a breach of warranty by plaintiff as to the covenants of the written contract upon which the action was based.

IV.

The Court erred in finding that the plaintiff did

not comply in all respects upon its part with said contract.

V.

The Court erred in finding that plaintiff represented to defendant that the engine could be made adequate by the addition of extensions upon the drive-wheels thereof. [78]

VI.

The Court erred in finding that the plaintiff represented to the defendant that a different kind of a plow was necessary to be used to make the engine adequate for defendant's work.

VII.

The Court erred in finding that plaintiff, by its conduct and representation waived the right to require defendant to decide on or before the fifth day from the beginning of the operation of the engine whether the same complied with his requirements.

VIII.

The Court erred in finding that because of the breach of warranty by plaintiff, the obligation of defendant upon the promissory notes given became null and void.

IX.

The Court erred in rendering judgment against plaintiff and in favor of defendant for costs of suit.

X.

The Court erred in permitting testimony of oral representations prior to the execution and delivery of the written contract.

XI.

The Court erred in permitting testimony of a mod-

ification of the written contract by an agent who had no authority in that behalf.

XII.

The Court erred in permitting the introduction of oral testimony to alter or modify the terms of the written contract made by the parties. [79]

WHEREFORE, because the foregoing evidence and testimony, rulings and exceptions do not appear of record, I, the undersigned, the Judge who tried said action, have, on due notice and after a hearing upon the proposed bill of exceptions and the amendments thereto, settled, allowed and signed this engrossed bill of exceptions to the end that the same may be made a part of the record herein, this 10th day of January, A. D. 1914, and I certify that so much of said testimony as appears herein in the form of question and answer so appears with my consent because I deemed it material that it should so appear.

OLIN WELLBORN,

Judge of the U. S. District Court.

[Endorsed]: 183. At Law—Civil. In the District Court of the United States, in and for the Southern District of California, Southern Division, Sitting at Los Angeles. Fairbanks, Morse & Company, a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Engrossed Bill of Exceptions. Filed Jan. 10, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Stutsman & Stutsman 903 California Bldg., 2d and Broadway, Main 3903, A-1543, Attorneys for Plaintiff. [80]

[Plaintiff's Exhibit "A"—Articles of Incorporation
of Fairbanks, Morse & Co.]

STATE OF ILLINOIS.

DEPARTMENT OF STATE.

CORNELIUS J. DOYLE, Secretary of State.

TO ALL TO WHOM THESE PRESENTS SHALL
COME, GREETING:

I, CORNELIUS J. DOYLE, Secretary of State of the State of Illinois, do hereby certify that the following and hereto attached is a true copy of Articles of Incorporation of Fairbanks, Morse & Co., the original of which is now on file and a matter of record in this office.

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the great Seal of State.

Done at the City of Springfield, this 24th day of August, A. D. 1912.

(Seal)

C. J. DOYLE,

Secretary of State. [81]

State of Illinois,

Cook County,—ss.

We, whose names are hereunto affixed, Charles H. Morse, C. A. Sharpe, and W. E. Miller, propose to form a corporation under an Act of the State of Illinois entitled "An Act concerning corporations" approved April 18th, 1872, and all acts amendatory thereof; and make the following statement as to such proposition:

1. The name of the proposed corporation shall be "Fairbanks, Morse & Co."

2. The object for which the corporation is to be formed is for the purpose of manufacturing and to manufacture scales and all kinds of weighing instruments and apparatus and any and all machines, machinery, tools, instruments and other manufacture made in whole or in part from iron, brass and other metals, and wood and other materials; and for buying and selling the same, and for carrying on such other business as shall be appropriate and necessary in connection therewith or incidental thereto; also to engage in the manufacture, importation, exporting, buying and selling of, and trading in, goods, wares, merchandise and commodities, either upon commission or otherwise; and generally to transact all business necessary or incidental thereto or connected therewith.

3. Its capital stock shall be one million dollars (\$1,000,000).

4. The amount of each share shall be one hundred dollars (\$100.00).

5. The number of shares of which such stock shall consist shall be ten thousand (\$10,000).

6. The location of its principal office shall be in the city of Chicago, in the county of Cook and State of Illinois. [82]

7. The duration of the corporation shall be ninety-nine (99) years.

CHARLES H. MORSE. (Seal)

C. A. SHARPE. (Seal)

W. E. MILLER. (Seal)

State of Illinois,
Cook County,—ss.

I, William A. Purcell, a notary public in and for said Cook County, in the State aforesaid, do hereby certify that Charles H. Morse, C. A. Sharpe and W. E. Miller, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this 16th day of June, 1891.

[Seal]

WILLIAM A. PURCELL,
Notary Public.

FILED

JUNE

17,

1891.

I. N. PEARSON,
Sec'y of State. [83]

STATE OF ILLINOIS.

DEPARTMENT OF STATE.

ISAAC N. PEARSON, Secretary of State.

TO ALL TO WHOM THESE PRESENTS SHALL
COME—GREETING:

Whereas, It being proposed by the persons herein-after named to form a corporation under an Act of the General Assembly of the State of Illinois, entitled "An Act Concerning Corporations," approved

April 18, 1872, in force July 1, 1872, and the amendments thereto, the object and purposes of which corporation are set forth in a statement duly signed and acknowledged according to law, and this day filed in the office of the Secretary of State.

NOW, THEREFORE, I, ISAAC N. PEARSON, Secretary of State of the State of Illinois, by virtue of the power vested in and the duties imposed upon me by law, do hereby authorize, empower, and license

CHARLES H. MORSE

C. A. SHARPE, and

W. E. MILLER

the persons whose names are signed to the before mentioned statement, as Commissioners to open books for subscription to the Capital stock of said FAIRBANKS, MORSE & CO. such being the name of the proposed corporation, as contained in the statement, at such times and places as the said Commissioners may determine.

IN TESTIMONY WHEREOF, I hereunto set my hand and cause to be affixed the Great Seal of State.

Done at the City of Springfield, this 17th [84] day of June, A. D. 1891, and of the Independence of the United States the one hundred and 15th.

(Seal)

I. N. PEARSON,
Secretary of State.

TO ISAAC N. PEARSON,

Secretary of State of the State of Illinois:

The Commissioners, duly authorized to open Books of Subscription to the Capital stock of

FAIRBANKS, MORSE & CO.

pursuant to license heretofore issued, bearing date

the 17th day of June, A. D. 1891, do hereby report that they opened books of Subscription to the Capital Stock of said Company, and that the said Stock was fully subscribed; that the following is a true copy of such subscription, viz.:

We, the undersigned, hereby severally subscribe for the number of shares set opposite our respective names, to the Capital Stock of

FAIRBANKS, MORSE & CO.

and we severally agree to pay the said Company, for each share, the sum of one hundred Dollars. (\$100)

NAME.	SHARES.	AMOUNT.
CHARLES H. MORSE.....	5000	\$500,000.00
WM. P. FAIRBANKS.....	4997	499,700.00
C. A. SHARPE.....	1	100.00
EDWARD REITER.....	1	100.00
W. E. MILLER.....	1	100.00

[85]

That on the twenty-ninth day of June, A. D. 1891, at the office of Fairbanks, Morse & Co., 160 Lake St. Chicago, Illinois, at the hour of 11 o'clock A. M., they convened a meeting of the subscribers aforesaid pursuant to notice required by law, which said notice was deposited in the postoffice *property* addressed to each subscriber, ten days before the time fixed therein, a copy of which said notice is as follows, to wit:

To William P. Fairbanks, Charles H. Morse, C. A. Sharpe, W. E. Miller and Edward Reiter.

You are hereby notified that the Capital Stock of

FAIRBANKS, MORSE & CO.

has been fully subscribed, and that a meeting of the subscribers of such stock will be held at the office of Fairbanks, Morse & Co. 160 Lake Street, Chicago,

Illinois on the 29th day of June, A. D. 1891, at 11 o'clock, A. M. for the purpose of electing a Board of Directors for said Company and for the transaction of such other business as may be deemed necessary:

Signed, CHARLES H. MORSE,
C. A. SHARPE.
W. E. MILLER.

That said subscribers met at the time and place in said notice specified, and proceeded to elect Directors and that the following persons were duly elected for the term of one year, viz.:

CHARLES H. MORSE.
WILLIAM P. FAIRBANKS.
C. A. SHARPE.
EDWARD REITER.
W. E. MILLER.

CHARLES H. MORSE,
C. A. SHARPE,
W. E. MILLER,

Commissioners. [86]

STATE OF ILLINOIS.

DEPARTMENT OF STATE.

ISAAC N. PEARSON, Secretary of State.

TO ALL TO WHOM THESE PRESENTS SHALL
COME—GREETING:

Whereas, a Statement, duly signed and acknowledged, has been filed in the office of the Secretary of State, on the 17th day of June, A. D. 1891, for the organization of the

FAIRBANKS, MORSE & CO.

under and in accordance with the provisions of "AN ACT CONCERNING CORPORATIONS," approved

April 18, 1872, and in force July 1, 1872, and all acts amendatory thereof, a copy of which statement is hereto attached;

And whereas, a LICENSE having been issued to CHARLES H. MORSE, C. A. SHARPE AND W. E. MILLER, as Commissioners to open books for subscription to the Capital Stock of said Company:

And Whereas, the said Commissioners have, on the 30th day of June, A. D. 1891, filed in the office of the Secretary of State a report of their proceedings under the said License, a copy of which report is hereunto attached.

NOW, THEREFORE, I, ISAAC N. PEARSON, Secretary of State of the State of Illinois, by virtue of the powers vested in me by law, do hereby certify that the said

FAIRBANKS, MORSE & CO. is a legally organized corporation under the laws of this State.

IN TESTIMONY WHEREOF, I hereunto set my hand and cause to be affixed the Great Seal of State.

Done at the City of Springfield, this 30th day of June, A. D. 1891, and [87] of the Independence of the United States the one hundred and 15th.

[Seal]

I. N. PEARSON,
Secretary of State.

State of Illinois,
County of Cook,—ss.

I, FRANK M. BOUGHEY, do hereby certify that I am Secretary of Fairbanks, Morse & Co., a Corporation duly organized under the laws of the State of Illinois, and that as such Secretary I have charge and custody of all the incorporation papers of said Fair-

banks, Morse & Co., and of its original charter, and I further certify as such Secretary that the foregoing Articles of Incorporation of Fairbanks, Morse & Company, certified by the Secretary of State of the State of Illinois, are true copies of the Articles of Incorporation and Charter of said Fairbanks, Morse & Co., in my custody as such Secretary, including copy of the application for license, copy of license issued by the Secretary of State of the State of Illinois, on June 17, 1891, to receive subscriptions to the capital stock, copy of the report of the Commissioners as licensed to receive subscriptions to the capital stock of the Company and a copy of the charter of said Fairbanks, Morse & Co., issued on the 30th day of June, 1891, and I further certify that said Articles of Incorporation, of which the foregoing are true copies, are in entire accordance with the laws of the State of Illinois, and that the foregoing Articles of Incorporation constitute the charter of said Fairbanks, Morse & Co., a corporation.

WITNESS my hand and seal of said Fairbanks, Morse & Co., at Chicago, Illinois, this 6th day of March, A. D. 1913.

[Seal]

F. M. BOUGHEY,
Secretary.

[Endorsed]: 183—Civil. Fairbanks, Morse, etc. vs. J. M. Nelson. Plaintiff's Exhibit "A." Filed Mar. 19, 1913. Wm. M. Van Dyke, Clerk. [88]

[Plaintiff's Exhibit "B"—Contract, Dated March 29, 1912, Fairbanks, Morse & Co.—J. M. Nelson.]

FAIRBANKS-MORSE GAS AND GASOLINE
ENGINES.

Los Angeles, Cal., Mar. 25, 1912. 19

Mr. J. M. Nelson,

Moreno, Cal.

Dear Sir:—

We hereby propose to furnish one 60 H. P. (actual) Fairbanks-Morse Oil Tractor, F. O. B. Alessandro, Cal.

This engine has been tested at our factory at Beloit, Wis., with a break test and "Fairbanks" scale and over 60 actual horse-power developed.

With this engine we furnish one pulley; one galvanized steel supply tank, with necessary pipe and fittings to connect tank; exhaust pipe and fittings; one electric ignitor and battery; necessary wrenches and oil can; and with each Fairbanks, Morse horizontal engine, over 8 H. P., we furnish our ~~Patent Self Starting Device.~~

The bearings of this engine are of ~~brass and phosphor bronze,~~ and the crank shaft and connecting rod of forged steel. The valves are water jacketed.

We guarantee this engine and all other machinery furnished hereunder to be made of good material and in a workmanlike manner, and if any part of said engine or machinery shows defective material or workmanship within one year, we agree to furnish a new

part free of cost to replace such defective part, but we assume no liability for, nor will we be responsible for damages or delays caused by such defective material or workmanship, nor will we make any allowance for repairs or alterations made by others, unless same are made with our written consent.

With the above engine we also propose to furnish: Above engine is sold with the understanding that it proves adequate for your work. For the purpose of testing out engine we agree to furnish a competent man for 2 days within 10 days of [89] receipt of engine at Alessandro. This man to operate and demonstrate the engine regular working hours during his stay on your place. On or before the 5th day you agree to decide whether engine complies with your requirements or not. If you find engine is not sufficient for your needs, you agree to give our men all necessary assistance loading the engine at Alessandro, pay freight on same to Los Angeles, and this contract becomes void.

The price of above machinery is \$3600.00 Thirty Six HundredDollars, payable in gold coin at the office of Fairbanks, Morse & Company, Los Angeles, California, which sum said J. M. Nelson agrees and promises to pay as follows:

\$1200.00 cash on or before June 25, 1912	} Notes to S. J. L. 3/25/12. (m)
1200.00 " " " " Mar. 25, 1913	
1200.00 " " " " Mar. 25, 1914	

All deferred payments to be evidenced by promissory notes dated Mar. 25, 1912, bearing seven per cent interest per annum and if each and every payment is not made when due as above provided, then

the entire amount, together with interest, shall immediately become due and payable at our option. You agree to pay all attorneys' fees and expenses incurred by us in the collection thereof, whether suit is filed or not.

The title and right of possession to the property furnished under this agreement shall remain in Fairbanks, Morse & Company until all payments hereunder (including deferred payments and any notes, judgments or renewals thereof, if any) shall have been fully made in U. S. gold coin and the machinery and equipment herein described shall remain the personal property of Fairbanks, Morse & Company, whatever may be its mode of attachment to realty or otherwise, until fully paid for in U. S. gold coin and upon failure to make payments (or any [90] of them) as herein provided, we may retain any and all payments which may have been made as liquidated damages and may deny the use of said property or any part thereof and be free to enter the premises where said machinery or equipment may be located, and to remove the same as our property without process of law and without prejudice to any further claims on account of damages which we may suffer from any cause, and we shall not be liable in any action at law or in equity for removing our property hereunder.

It is agreed that upon acceptance of this proposal we will make delivery of above machinery without unnecessary delays, and that the purchaser will receive the property herein specified in accordance with the terms of this contract, and shall become respon-

sible therefor after its delivery at the point designated herein. The purchaser also agrees to make good any loss to Fairbanks-Morse & Company occasioned by fire or any other cause after delivery at the point designated herein, and until the full amount herein agreed upon has been paid.

It is understood that we shall not be held responsible for any delay in delivery or loss occasioned thereby which shall be caused by fire, strikes, non-receipt of material required, delays in transit, or any other cause beyond our control; also that the acceptance of apparatus by purchaser shall constitute a waiver of all claims for damages or loss occasioned by any delay which may have occurred.

Cancellation of this contract may be accepted by us under conditions satisfactory to us, in which case Purchaser agrees to pay not less than twenty per cent of contract price.

It is understood that this contract is the only one existing between the parties hereto, and that all communications or [91] understandings, either verbal or written, contrary to this proposal and specifications, are hereby withdrawn and annulled.

This contract is subject to the written approval of the Agent of Fairbanks, Morse & Company at Los Angeles, California, and when so approved shall im-

mediately become binding on all parties hereto.

Respectfully submitted,

FAIRBANKS, MORSE & CO.

By H. J. REULAND.

Approved: C. KNAGENHELM.

Accepted:

J. M. NELSON.

References:

O. K.—MEYER

DILLE.

[Endorsed]: Contract. No. With J. M. Nelson.
Moreno. Engine No. 60 HP. Tractor. Price,
\$3,600.00.

Date 3/25/12

Shipped.....

.....

.....

Payable

.....

Sold by

Erected by

(m)

183—Civil. Fairbanks, Morse & C. vs. J. M. Nelson. Plff's. Exhibit "B." Filed Mar. 19, 1913. Wm. M. Van Dyke, Clerk. [92]

**[Plaintiff's Exhibit "C"—Note of J. M. Nelson,
Dated March 25, 1912.]**

19476.

\$1200.00.

No. 1825.

Los Angeles, Calif. Mar. 25, 1912.

Ninety Days after date for value received,

Fairbanks
Standard
Scales

I promise to pay to FAIRBANKS, MORSE
& CO., Inc., or order, at Citizens' National

Bank, Los Angeles, Cal., Twelve Hundred Dollars, with interest from date until paid, at the rate of seven per cent per annum payable at maturity, and if not so paid, the interest shall become a part of the principal and thereafter bear like interest as the principal. Should this note be placed in the hands of an attorney for collection, I agree to pay an additional sum of ten per cent on principal as attorney's fees. Principal and interest payable in gold coin of the United States.

Address—Moreno, Cal.

Redlands.

J. M. NELSON.

[Endorsed]: 2164. Pay to the Order of the Citizens' National Bank of Los Angeles, Fairbanks, Morse, & Co. Pay to the Order of any Bank or Banker. The Citizens' National Bank of Los Angeles, Cal., Collection Department. E. T. Pettigrew, Cashier. 183—Civil. Fairbanks, Morse, etc. vs. J. M. Nelson. Plff's. Exhibit "C." Filed Mar. 19, 1913. Wm. M. Van Dyke, Clerk. [93]

**[Plaintiff's Exhibit "D"—Note of J. M. Nelson,
Dated March 25, 1912.]**

\$1200.00.

No. 1826.

Los Angeles, Calif. Mch. 25, 1912.

One year after date for value received, I promise to pay to FAIRBANKS, MORSE & CO., Inc., or order, at Citizens' National Bank, Los Angeles, Cal., Twelve Hundred

Dollars, with interest from date until paid, at the rate of seven per cent per annum payable at maturity, and if not so paid, the interest shall become a part of the principal and thereafter bear like interest as the principal. Should this note be placed in the hands of an attorney for collection, I agree to pay an additional sum of ten per cent on principal as attorney's fees. Principal and interest payable in gold coin of the United States.

24686.

Address—Moreno, Cal.

J. M. NELSON.

[Endorsed]: 2164. Pay to the Order of the Citizens' National Bank of Los Angeles. Fairbanks, Morse & Co.

~~Pay to the Order of~~
~~ANY BANK OR BANKER,~~
~~The Citizens' National Bank~~
~~Collection Department,~~
~~E. T. PETTIGREW, Cashier.~~
.....ERASED.....

183—Civil. Fairbanks, Morse, etc. vs. J. M. Nelson. Plff's. Exhibit "D." Filed Mar. 19, 1913. Wm. M. Van Dyke, Clerk. [94]

[Plaintiff's Exhibit "E"—Note of **J. M. Nelson,**
Dated **March 25, 1912.**]

\$1200.00.

No. 1827.

Los Angeles, Calif. Mar. 25, 1912.

Two years after date for value received, I promise to pay to FAIRBANKS, MORSE & CO., Inc., or order, at Citizens' National Bank, Los Angeles, Cal., Twelve Hundred Dollars, with interest from date until paid, at the rate of seven per cent per annum payable at maturity, and if not so paid, the interest shall become a part of the principal and thereafter bear like interest as the principal. Should this note be placed in the hands of an attorney for collection, I agree to pay an additional sum of ten per cent on principal as attorney's fees. Principal and interest payable in gold coin of the United States.

Address—Moreno, Cal.

J. M. NELSON.

[Endorsed]: 183—Civil. Fairbanks, Morse & Co. vs. J. M. Nelson. Plff's. Exhibit "E." Filed Mar. 19, 1913. W. M. Van Dyke, Clerk. [95]

Fairbanks
Standard
Scales

Wind Mill World.
Eclipse
Trade
Mark

[Notice of and Motion for a New Trial.]

*In the District Court of the United States, Southern
District of California, Southern Division.*

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,

Defendant.

NOTICE OF MOTION FOR A NEW TRIAL.

To the Above-named Defendant, and to Messrs. Collier and Craig, Attorneys for Defendant:

YOU, AND EACH OF YOU, will please take notice that the plaintiff in the above-entitled cause will move the Court, at the courtroom in the Federal Building, in Los Angeles, California, to set aside and vacate the findings and judgment rendered in the above-entitled cause, and to grant to plaintiff a new trial thereof, upon the following grounds, to wit:

First: Because the evidence produced upon the trial was insufficient to justify the findings and judgment of the Court, and not sufficient to support the same.

Second: Because the findings of the Court are contrary to the evidence, and not supported by the testimony.

Third: Because the judgment is not supported by the findings, and is contrary to the evidence.

Fourth: Because the judgment is against the law.

Fifth: Because the Court erred in the admission

of certain testimony over the objections of the plaintiff.

Sixth: Because the Court erred in rejecting certain testimony offered by the plaintiff. [96]

Seventh: Because the Court erred in certain rulings upon the objections of counsel for plaintiff.

Eighth: Because the Court erred in admitting testimony over the objections of plaintiff, permitting the alteration or reformation of a written contract entered into by the parties hereto contrary to the statute of the State of California, and the law, as therein defined.

Ninth: Because the Court erred in finding that there was a breach of warranty by the plaintiff as to the covenants and conditions contained in the written contract entered into between plaintiff and defendant, upon which this action was based.

Tenth: Because the Court erred in finding that the plaintiff herein did not comply in all respects upon its part with the said written contract.

Eleventh: Because the Court erred in finding that the plaintiff represented to the defendant that the engine in suit could be made adequate for defendant's work by the addition of extensions upon the drive-wheels of the said engine.

Twelfth: Because the Court erred in finding that the plaintiff represented to the defendant that a different kind of a plow was necessary to be used with said engine to make the same adequate for defendant's work.

Thirteenth: Because the Court erred in finding that said engine when used in connection with said

different kind of plows, was not adequate for the defendant's work.

Fourteenth: Because the Court erred in finding that the plaintiff, by its conduct and representations, waived the right to require defendant to decide on or before the fifth day from the beginning of the operation of said engine whether the same complied with his requirements.

Fifteenth: Because the Court erred in finding that the defendant notified the plaintiff to furnish a man to properly [97] test and demonstrate said engine after said extensions were furnished and said different plows were used by defendant.

Sixteenth: Because the Court erred in finding that because of the breach of warranty by plaintiff the obligation of defendant upon the promissory notes given under said contract, became null and void.

Seventeenth: Because the Court erred in rendering judgment against plaintiff and in favor of defendant for his costs herein expended.

The said motion will be made upon the minutes of the Court, including the notes of the evidence taken down by the reporter, and upon the pleadings, papers and files of said cause, and upon all the rulings made by the Court and excepted to by the plaintiff, and will be brought on for argument on Monday, October 6th, 1913.

Dated September 30th, 1913.

STUTSMAN & STUTSMAN,

Attorneys for Plaintiff.

[Endorsed]: No. 183—Civil. In the District Court United States, Southern District California, Southern Division. Fairbanks, Morse & Co., a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Notice of Motion to Move for a New Trial. Filed Oct. 2, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Rec'd Copy October 1st, 1913. Collier & Craig, Attorneys for Defendant. Stutsman and Stutsman, 903 California Bldg., Attorneys for Plaintiff. [98]

**[Additional Ground of Motion for New Trial and
Stipulation Relative Thereto.]**

*In the District Court of the United States, Southern
District of California, Southern Division.*

FAIRBANKS, MORSE & COMPANY, a Corporation,
tion,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

Now comes the plaintiff in the above-entitled cause, and with leave of Court first had and obtained, and upon stipulation with counsel for defendant, adds the following ground to its Notice of Motion for New Trial, to wit:

XVIII.

Eighteen: Because the Court erred in permitting the introduction of oral testimony to alter or modify

the terms of the written contract entered into by the parties hereto.

STUTSMAN & STUTSMAN,

Attorneys for Plaintiff.

It is hereby agreed that the above additional ground to plaintiff's Notice of Motion for a New Trial may be filed herein and presented with the other grounds to the said Court upon the argument of counsel, waiving notice and time.

COLLIER & CRAIG,

Attorneys for Defendant.

Dated Oct. 20, 1913.

[Endorsed]: No. 183—Civil. In the District Court of the United States, Southern District of California, Southern Division. Fairbanks, Morse & Company, a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Additional Ground of Motion for New Trial and Stipulation. Filed Oct. 23, 1913. Wm. M. Van Dyke, Clerk. [99] By Chas. N. Williams, Deputy Clerk. Stutsman & Stutsman, 903 California Building, Second and Broadway, Los Angeles, Cal. Phones: Home A-1543 Sunset: Main 3903, Attorneys for Plaintiff. [100]

[Order of October 6, 1913, Continuing Motion for New Trial.]

At a stated term, to wit, the July Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on

Monday, the sixth day of October, in the year of our Lord, one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 183—CIVIL S. D.

FAIRBANKS, MORSE & COMPANY, a Corporation,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

This cause coming on this day to be heard under and pursuant to plaintiff's motion for a new trial therein; now, it appearing that the parties hereto, by their counsel, have consented thereto, it is ordered that said cause be, and the same hereby is continued until Monday, the 20th day of October, 1913, at 10:30 o'clock A. M., for said hearing. [101]

[Order of October 20, 1913, Continuing Motion for New Trial.]

At a stated term, to wit, the July Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the twentieth day of October, in the year of our Lord, one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 183—CIVIL S. D.

FAIRBANKS, MORSE & COMPANY, a Corpora-
tion,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

This cause coming on this day to be heard on plaintiff's motion for a new trial thereof; A. H. Stutsman, Esq., appearing as counsel for plaintiff; Wm. Collier, Esq., appearing as counsel for defendant; now, on motion of Wm. Collier, Esq., of counsel for defendant, and by consent, it is ordered that said cause be, and the same hereby is continued until Monday, the 3d day of November, 1913, at 10:30 o'clock A. M., for said hearing. [102]

**[Order of November 3, 1913, Continuing Motion for
New Trial.]**

At a stated term, to wit, the July Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the third day of November, in the year of our Lord, one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 183—CIVIL S. D.

FAIRBANKS, MORSE & COMPANY,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

This cause coming on this day to be heard on plaintiff's motion for a new trial thereof; Carl A. Stutsman, Esq., appearing as counsel for plaintiff; Hugh H. Craig, Esq., appearing as counsel for defendant; now, good cause appearing therefor, it is ordered that this cause be, and the same hereby is continued until the hour of 2 o'clock, P. M., of this day for said hearing. [103]

[Order of November 3, 1913, Continuing Motion for New Trial.]

At a stated term, to wit, the July Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the third day of November, in the year of our Lord, one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 183—CIVIL S. D.

FAIRBANKS, MORSE & COMPANY,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

This cause coming on at this time to be heard on plaintiff's motion for a new trial thereof; Carl A. Stutsman, Esq., appearing as counsel for plaintiff; Hugh H. Craig, Esq., appearing as counsel for defendant; now, good cause appearing therefor, it is ordered that this cause be, and the same hereby is continued until Monday, the 17th day of November, 1913, at 10:30 o'clock A. M., for said hearing. [104]

[Order Denying Motion for New Trial.]

At a stated term, to wit, the July Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the seventeenth day of November, in the year of our Lord, one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 183—CIVIL S. D.

FAIRBANKS, MORSE & COMPANY,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

This cause coming on this day to be heard on plaintiff's motion for a new trial thereof; C. A. Stutsman, Esq., appearing as counsel for plaintiff; Hugh H. Craig, Esq., appearing as counsel for defendant; and said motion having been argued in support thereof, by C. A. Stutsman, Esq., of counsel for plaintiff; and said cause having been submitted to the Court for its consideration and decision on said motion, and the oral argument thereof; it is by the Court ordered that plaintiff's motion for a new trial be, and the same hereby is denied, to which ruling of the Court, on motion of plaintiff and by direction of the Court, exceptions are hereby noted herein on behalf of said plaintiff. [105]

**[Petition for, and Order Allowing Writ of Error and
Fixing Amount of Bond.]**

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division, Sitting at Los Angeles.*

AT LAW—183—CIVIL.

FAIRBANKS, MORSE & COMPANY, a Corpora-
tion,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

PETITION FOR WRIT OF ERROR.

To the Hon. OLIN WELLBORN, Judge of the District Court Aforesaid:

Now comes Fairbanks, Morse & Company, a corporation, plaintiff in the above-entitled cause, by Stutsman & Stutsman, its attorneys, and respectfully shows that on the 2d day of September, A. D. 1913, the Court directed findings and a judgment against your petitioner, and in favor of J. M. Nelson, defendant, and upon said findings, a final judgment was entered on the 22d day of September, A. D. 1913, against your petitioner, plaintiff in said cause.

Your petitioner, feeling itself aggrieved by the said verdict and judgment entered thereon, as aforesaid, herewith petitions the Court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a Writ of Error do issue; that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, [106] sitting at San Francisco, in said Circuit, for the correction of the errors complained of and herewith assigned, be allowed, and that an Order fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such Bond as may be required, that all further proceedings may be suspended until the determination of said Writ of Error

by the Circuit Court of Appeals.

STUTSMAN & STUTSMAN,
Attorneys for Petitioner in Error.

“Writ of Error granted, this, the 28th day of January, A. D. 1914. Bond fixed at \$300.00.”

OLIN WELLBORN,
Judge of the U. S. District Court.

[Endorsed]: 183—At Law—Civil. In the District Court of the United States, in and for the Southern District of California, Southern Division, Sitting at Los Angeles. Fairbanks, Morse & Company, a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Petition for Writ of Error. Filed Jan. 28, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Stutsman & Stutsman, 903 California Building, Attorneys for Plaintiff. [107]

[Bond on Writ of Error.]

In the District Court of the United States, in and for the Southern District of California, Southern Division, Sitting at Los Angeles.

AT LAW—183—CIVIL.

FAIRBANKS, MORSE & COMPANY, a Corporation,
Plaintiff,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

WRIT OF ERROR BOND.

KNOW ALL MEN BY THESE PRESENTS:
That we, Fairbanks, Morse & Co., a corp., and Na-

tional Surety Co. of New York, as sureties, are held and firmly bound unto J. M. Nelson, in the full and just sum of Three Hundred (\$300.00) Dollars, to be paid to the said J. M. Nelson, his administrators, executors or assigns, to which payment well and truly to be made, we bind ourselves, our successors, assigns, executors and administrators, jointly and severally, by these presents:

Signed and dated, this, the 28 day of January A. D. 1914.

Whereas, lately, at a regular term of the District Court of the United States for the Southern District of California, Southern Division, sitting at Los Angeles, in said District, in the suit pending in said court between Fairbanks, Morse & Company, a Corporation, as plaintiff, and J. M. Nelson, as defendant, cause No. 183, on the law docket of said court, final judgment was rendered against the said Fairbanks, Morse & Company, plaintiff, that plaintiff take nothing by said [108] action, and that defendant recover from plaintiff its costs therein expended in the sum of \$140.40, and the said Fairbanks, Morse & Company, a corporation, plaintiff, has obtained a Writ of Error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment of the said court, in the aforesaid suit, and a citation directed to the said J. M. Nelson, defendant in error, citing him to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, according to law, within thirty days from the date hereof.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the said Fairbanks, Morse & Company, a corporation, plaintiff in error, shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

FAIRBANKS, MORSE & CO., a
Corporation, [Seal]
By C. KNAGENHELM, Agt. [Seal]
NATIONAL SURETY COMPANY. [Seal]
By CATESBY C. THOM,
Its Attorney in Fact.

State of California,
County of Los Angeles,—ss.

On this 28th day of January, in the year one thousand nine hundred and fourteen, before me, William M. Curran, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Catesby C. Thom, known to me to be the duly authorized Attorney in Fact of National Surety Company, and the same person whose name is subscribed [109] to the within instrument as the Attorney in Fact of said Company, and the said Catesby C. Thom, acknowledged to me that he subscribed the name of National Surety Company thereto as principal, and his own name as Attorney in Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year

in this certificate first above written.

[Seal]

WILLIAM M. CURRAN,

Notary Public in and for Los Angeles County, State
of California.

[Endorsed]: 183—At Law—Civil. In the District Court of the United States, in and for the Southern District of California, Southern Division, Sitting at Los Angeles. Fairbanks, Morse & Company, a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Writ of Error Bond. Approved Jany. 28, 1914. Olin Wellborn, U. S. District Judge. Filed Jan. 28, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Stutsman & Stutsman, 903 California Bldg., 2d and Broadway, Main 3903, A-1543, Attorneys for Plaintiff. [110]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division, Sitting at Los Angeles.*

AT LAW—183—CIVIL.

FAIRBANKS, MORSE & COMPANY, a Corpora-
tion,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

Assignments of Error.

Now comes Fairbanks, Morse & Company, a corporation, plaintiff in the above-entitled cause, and plaintiff in error herein, and in connection with its petition for a Writ of Error in this cause, assigns the

following errors which plaintiff in error avers occurred on the trial thereof, and upon which it relies to reverse the judgment entered herein as appears of record.

1. The Court erred in permitting the introduction of oral testimony to alter or modify the terms of the written contract made by the parties upon the ground that a written contract may not be altered, except by another written contract or an executed oral agreement, and the following is the full substance of the said evidence so admitted over objection of plaintiff.

Defendant Nelson testified the bull wheels of the tractor made deep impressions on the land because the ground was wet; that he called Reuland's attention to it, and he said that could be overcome by putting extensions on, and that he would get the weights. That on the evening of the [111] third day he talked with Reuland, who said he was going to leave and had to get home in order to telegraph to the factory where these extensions were made to get them on a car being loaded so that they could be gotten out here without any delay. There was nothing said about my accepting the machine. The extensions came. I never ordered them. McDearmon put them on. Before leaving on the evening of the third day Reuland measured on his automobile head the width of the extensions, stating it would give the wheels so much more bearing on the ground and more tractive power so the engine could make better progress. He said the extensions would be here in about ten days. They came on May 11th.

2. The Court erred in the admission of the testi-

mony set forth in the first assignment above, over the objections of plaintiff, which testimony was offered as a waiver of the five-day limitation provided in the contract on the ground that the effect thereof was to alter and modify the terms of the said written contract.

3. The Court erred in permitting the introduction of oral testimony and written evidence as to representations made prior to the execution and delivery of the written contract upon the ground that the same superseded all prior negotiations and no evidence other than the contents thereof was permissible or lawful, and the full substance of the said evidence erroneously admitted over objection of plaintiff is as follows:

Defendant Nelson identified a printed circular introduced as Defendant's Exhibit "A," as being a document used prior to the contract in the negotiations for the sale to him of the tractor and stated that it was represented to him that the tractor was able to make two miles an hour, [112] plowing with 18 plows, except in bad places, where it would make a mile and three-quarters. That the circular was given to him by Reuland the latter part of February, 1912, when we were negotiating.

The Court erred in overruling the objections of plaintiff to the introduction of all of the above testimony and evidence.

4. The Court erred in permitting the introduction of oral testimony as to representations made to defendant prior to the execution of the written contract, upon the ground that prior representations be-

came merged in said written contract, which in the absence of fraud, accident or mistake is conclusive as to the agreement of the parties, and the following is the full substance of the evidence so erroneously admitted over the objections of plaintiff.

Defendant Nelson testified that he had a talk with Reuland prior to signing the contract about a traction engine of another make used in the neighborhood, which talk occurred the latter part of February. That he called Reuland's attention to the other machine and what it would do; that it went at the rate of 35 acres in a half a day, or 70 acres in 24 hours, to which Reuland stated that if his tractor could not plow as much as that machine, he would give it to him. That he (Nelson) relied upon the statements of Reuland as to what Reuland's machine would accomplish and expected the machine to do so many acres and travel so fast and do a certain amount of work.

5. The Court erred in permitting the introduction of testimony showing the modification of the written contract by an agent who had no authority in that behalf, upon the ground that the principal is not bound by the acts of his agent [113] beyond the scope of his authority, and the full substance of the evidence so erroneously admitted over objections of plaintiff is as follows:

The defendant Nelson testified that Reuland stated that it would be necessary to leave on the evening of the third day in order to get home to telegraph to the factory to get the extensions for the bull wheels without any delay, which he was to get in about ten

days and promised to secure them for him, the defendant. That the defendant was told to go ahead and do the best he could with the machine until the extensions got there and operated the tractor for about twenty minutes after the men left that night when it broke down and on the 16th of April, after it was repaired used it again until the 19th, when it again broke down and after being repaired on May 17th, again used it.

6. The Court erred in overruling the objections of plaintiff to the introduction of the above testimony, and all of the same upon the ground that the introduction thereof was not followed by proof establishing the authority of the agent in that behalf.

7. The Court erred in its special finding that plaintiff, by its conduct and representations, waived the right to require defendant to decide on or before the fifth day from the beginning of the operation of the engine whether the same complied with its requirements upon the ground that proof of such waiver being oral and not executed could not modify the written contract made by the parties.

8. The Court erred in finding that the plaintiff did not comply in all respects upon its part with said contract because the admitted testimony showed that plaintiff furnished and delivered to defendant the tractor required under the contract. [114]

9. The Court erred in its special finding that there was a breach of warranty by plaintiff as to the covenants of the written contract upon which the action was based, because plaintiff did not warrant the said tractor to the defendant in any respect except to re-

place defective parts within one year.

10. The Court erred in its special finding of the ultimate fact that there was a breach of warranty by plaintiff because the facts proven were not sufficient to sustain the judgment, and the testimony offered does not support the same.

WHEREFORE, plaintiff in error prays that the judgment of said Court be reversed and a new trial thereof ordered.

STUTSMAN & STUTSMAN,
Attorneys for Plaintiff in Error.

[Endorsed]: 183—At Law—Civil. In the District Court of the United States, in and for the Southern District of California, Sitting at Los Angeles. Fairbanks, Morse & Company, a Corporation, Plaintiff, vs. J. M. Nelson, Defendant. Assignments of Error. Filed Jan. 28, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Stutsman & Stutsman, 903 California Bldg., 2d and Broadway, Main 3903, A-1543, Attorneys for Plaintiff. [115]

Praeceptum [for Transcript of Record].

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

Clerk's Office.

No. 183—CIVIL.

FAIRBANKS, MORSE & CO., a Corporation,
Plaintiff,

vs.

J. M. NELSON,

Defendant.

To the Clerk of Said Court:

Sir: Please issue Transcript in above cause, of following described pleadings, papers, exhibits, etc.; Plaintiff's Complaint, Exhibit attached and Amended to Complaint.

Plaintiff's Exhibits "A," "B," "C," "D," and "E."

Writ of Subpoena served on defendant and return thereon.

Defendant's Answer.

Findings of Fact and Conclusions of Law.

Judgment.

Written Opinion of the Court.

Notice of Motion for New Trial and Amendment Thereto.

Orders Extending Time for Hearing Thereof.

Ruling of Court upon Motion for New Trial.

Engrossed Bill of Exceptions.

Petition for Writ of Error and Allowance Thereof.

Assignment of Errors.

Writ of Error. Bond and Approval Thereof.

The Writ of Error, Allowance and Certificate of Clerk.

Citation in Error.

Clerk's Certificate.

STUTSMAN & STUTSMAN,

Attorneys for Plaintiff.

[Endorsed]: No. 183-Civil. U. S. District Court, Southern [116] District of California, Southern Division. Fairbanks, Morse & Co. vs. J. M. Nelson. Praeceptum for Transcript. Filed Jan. 31, 1914. Wm.

M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [117]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States of
America, in and for the Southern District of
California, Southern Division.*

No. 183—CIVIL.

FAIRBANKS, MORSE & COMPANY, a Corpor-
ation,

Plaintiff,

vs.

J. M. NELSON,

Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and seventeen (117) typewritten pages, numbered from 1 to 117, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the pleadings and of all papers and proceedings upon which the judgment was made and entered in said cause, and also of the Judgment, Bill of Exceptions, Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error and Bond on Writ of Error, in the above and therein entitled cause, and that the same together constitute the record in said cause as specified in the Praecipe filed in my office, on behalf of the plaintiff, by its attorneys of record;

I do further certify that the cost of the foregoing record is \$58 85/100, the amount whereof has been [118] paid me by the Fairbanks, Morse & Company, a corporation, the plaintiff in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 11th day of February, in the year of our Lord, one thousand nine hundred and fourteen, and of our Independence, the one hundred and thirty-eighth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States, in
and for the Southern District of California.

[119]

[Endorsed]: No. 2379. United States Circuit Court of Appeals for the Ninth Circuit. Fairbanks, Morse & Company, a Corporation, Plaintiff in Error, vs. J. M. Nelson, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Received and filed February 16, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Fairbanks, Morse & Company, a
corporation,

Plaintiff in Error,

vs.

J. M. Nelson,

Defendant in Error.

OPENING BRIEF.

POINTS AND AUTHORITIES.

This is an action at law, based upon diversity of citizenship. Plaintiff in error, an Illinois corporation, made a written contract with defendant in error, a citizen of California, by the terms of which defendant in error purchased a tractor, in payment of which he executed and delivered his three promissory notes for twelve hundred dollars (\$1200) each to plaintiff in error. Failing to pay the notes, this action was commenced. Upon the trial in the lower court the execution of the contract and of the promissory notes were admitted. The proof that plaintiff in error is and was a foreign corporation was not controverted, and the delivery of the tractor to defendant in error upon his ranch was admitted in the pleadings, and the affirmative defense presented by the

answer that the contract did not truly express the agreement of the parties and that there was a mutual mistake, was abandoned upon the trial. The only issues presented, therefore, were those involved in certain affirmative defenses presented by the answer, and the questions of law now proposed upon this appeal grow out of the rulings of the trial court upon the admission or rejection of testimony, oral and documentary, upon these defenses, and the error of law in the special finding that plaintiff in error waived the provision of the written contract requiring defendant in error to accept or refuse the tractor not later than five days from the first demonstration thereof.

Confining this argument to the assignments of error presented by the record and in the order in which the assignments are made, it is claimed in the first assignment [page 111 original certified record, page 113, Transcript] that the court erred in permitting the introduction of oral testimony to alter or modify the terms of the written contract made by the parties. The contract required plaintiff in error to furnish a competent man for two days to demonstrate the tractor for defendant in error, who was to decide on or before the fifth day whether it fulfilled his requirements [original record, page 89, page 91, Transcript]. Notwithstanding this provision of the contract, the court permitted the defendant in error to testify that during the demonstration the wheels of the tractor sank into the ground to such an extent as to prevent a successful operation, and that the agent of plaintiff in error, to overcome this difficulty, promised to secure and furnish certain extensions

to be put upon the wheels, permitting them to offer a greater surface and prevent the sinking into the ground, and to that end left prior to the expiration of the fifth day for the purpose of securing them. The purpose of this testimony was to excuse a compliance by defendant in error with the obligation in his written contract to accept or reject the tractor on or before the fifth day. He was further permitted to testify that the extensions were in fact subsequently and after the expiration of the fifth day, put on, and it is insisted that this conduct of plaintiff in error amounted to a waiver of its right to insist on a decision by the fifth day. The law governing the rights of both parties upon this question is fixed by the provisions of section 1698, Civil Code of California, which is as follows:

A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise.

Since it is not claimed, nor was it proven, that the "decision on the fifth day" clause of the written contract was waived by a written agreement or that plaintiff in error agreed in writing to procure and furnish the extensions for the wheels, we are only concerned to inquire whether there was any oral agreement by plaintiff in error whatever, whether implied by unspoken conduct, amounting to a waiver, or otherwise, amounting in effect to a modification or alteration of the written contract, and to inquire whether, if there was such oral agreement, conduct or waiver, it became and was executed at any time prior to the expiration of the fifth day, provided in the written contract. Unless such oral agreement was executed, it could not modify the

written contract. So long as it remained executory, the rights of the parties must be measured by their written agreement. This must be so if the provisions of section 1698, Civil Code, mean anything. Prior to March 30, 1874, this section of our law contained the clause "except as to the time of performance which may be extended by any form of agreement," which were the closing words of the section. The legislature, on this date, amended the section by striking out this last clause and leaving it as we have quoted it above. It was the evident purpose of the legislature to make it impossible for the parties to a written contract to alter or vary the same, even as to the time of performance, unless that alteration be effected by another contract in writing, or by an executed oral agreement. It should be remembered that the waiver insisted upon by defendant in error in this case relates only to the time of the performance of a certain act under the contract, namely, the decision by him on or before five days as to whether the engine was adequate for his purposes. The contract in the case at bar specifically and in writing required him to decide on or before the fifth day. He contends that this time was extended by the conduct of the plaintiff in error in agreeing to put on certain extensions which were in fact not put on until the 17th day of May. In other words, that at the time of the performance by him of this act, namely, the decision as to whether the engine was adequate for his purposes, was extended by the parties themselves. In the contract the defendant in error was required to perform a certain act within a certain given time. His counsel claimed that this time was extended by the

acts and conduct of the plaintiff in error, and they relied upon the doctrine of waiver pronounced in *Knarston v. Manhattan Life Insurance Co.*, 140 Cal. 57. The trial court found [finding No. 7, bottom page 31, Transcript] that the "decision on the fifth day" clause in the written contract was waived by plaintiff in error by its conduct and representations and specifically adopted the doctrine in the *Knarston* case as decisive of the case at bar. [See conclusions of the court, page 38 of Transcript; also page 43 of original certified record.] Having decided the case at bar by the principle announced in the *Knarston* case, we believe the trial court erred, and we will attempt, briefly as possible, to differentiate the two cases.

The *Knarston* case was an action brought to recover upon a policy of life insurance, which policy contained the usual forfeiture clause, and the defense was that the policy had become forfeited prior to the death of the assured by his failure to make payment of the semi-annual premium provided for therein. This payment became due November 15, 1895, and the general manager of the company endeavored to collect this premium but failed, and subsequently the assured secured from the officers of the company two separate extensions of time within which to make the payment, and before the expiration of the second extension the assured was killed in a railroad accident. The Supreme Court held that the extensions of time for the payment of the annual premium might be proved by parol evidence, and that the effect of such evidence is not to vary the terms of the written contract of insurance, which contained no agreement to pay the premium, but

only a condition for its payment which the company or its agents were competent to waive. The distinction between the Knarston case and the case at bar is this: In the Knarston case the written contract contained no obligation which required the assured to perform any specific act, whereas in the case at bar the written contract specifically required the defendant in error to perform an affirmative act, to-wit: to decide on or before the fifth day whether the engine complied with his requirements. The Supreme Court says that in a contract for insurance there is no written promise on the part of the assured to pay the premiums as they fell due. That the legal effect of the contract by the company was that if the assured paid the premiums promptly as they matured, that the contract should continue in force. In other words, that it was possible for one of the parties to the contract to terminate the same by a failure to comply with the contract upon his part. In this respect contracts of life insurance should be distinguished from other written contracts, and particularly from the written contract in the case at bar. We ask the court to read the opinion of the Supreme Court as found upon page 62 of this report, in which the Supreme Court makes use of the following language: "In a contract of insurance, such as is involved here, there are no stipulations in the policy whereby the insured agrees to do anything. He does not agree to make any payments; is not liable upon the policy for any payments, and no action for any purpose can be maintained thereon against him. The agreement is solely one on the part of the company. That if payments are made at a given time by the insured, the con-

tract of insurance originally entered into will, on its part, be continued, with a provision therein that upon failure to make payment at the given date the policy will be void."

The court further says: "This latter provision, however, is one common to insurance policies, solely in favor of the company, and being so in its favor may be waived. This waiver is not an alteration of the terms of the contract. The contract continues in force by the election of the company not to avail itself of the reserved right of forfeiture." There is a clear distinction to be drawn between the Knarston case and the case at bar, because in the case at bar there was an agreement by defendant to do an affirmative act. It would be idle for counsel for defendant in error to contend that it is possible for him to refuse to be bound by the contract, and thus escape its liability. It would be idle for them to contend that because of the alleged waiver of plaintiff in error it was possible for the defendant in error to refuse to decide on or before the fifth day whether the engine complied with his needs, and therefore by so doing leave the decision forever open and claim that because he had not yet decided he could not be compelled to pay for the engine. In other words, in the contract in the case at bar, if the defendant in error would accept the benefit arising from his contract, he must also assume the responsibility.

The trial court, in its written conclusions [page 43 original certified record, page 38, Transcript], speaks of the "five days" clause as a limitation, and says: "This limitation, had it been effectual, would have forfeited a valuable right of the defendant, and was solely

for the benefit of the plaintiff,” forgetting that while it was a right, it was also a duty. The court labored under the impression that the contract was so drawn as to give defendant in error the option to accept or reject at any time, whereas, it was obligatory upon him to decide not later than five days. “On or before the fifth day, you agree to decide”;—these are the words of the contract. We believe the trial court erred in holding that section 1698 Civil Code and the case of *Hennehan v. Hart*, 127 Cal. 656, were inapplicable.

The Supreme Court of California decided in this case that the time for the payment of a promissory note past due cannot be extended for a definite period so as to bind the payee by an unexecuted oral agreement that the maker shall pay the interest monthly according to the terms of the note, for such period. In the decision of the court in this case the following significant language is used:

“It is difficult to conceive how an oral agreement extending the time in which a written agreement is to be performed can be executed until the time has elapsed, and then the question could not arise. If the period of time mentioned in the oral agreement has not elapsed, then the agreement has not been executed.” (Citing certain cases.)

In other words, the oral agreement to put on the extensions did not lapse until May 17th, and it was impossible for an oral agreement to do anything on May 17th, to become executed at any time previous to that date, and certainly not before the expiration of April 5th, which was the day the contract required defendant in error to decide. The court further says:

“Counsel for appellant cites *Waugenheim v. Graham*, 39 Cal. 175, to the effect that the time for the performance of a contract in writing may be extended by parol. The case was decided in April, 1870,” previous to the adoption of the codes, and at a time when section 1698 contained this clause, “except as to the time of performance which may be extended by any form of agreement.” This section was amended March 30, 1874, by dropping the quoted clause, and after the amendment went into effect, July 1, 1874, the section has continued as at present. We think the amendment was a necessary and wise one. It prevents the solemn written contract which the parties have made certain from being tampered with, annulled, set aside, or extended by the oral evidence of interested parties. The section as amended lays down a valuable and salutary rule in regard to written instruments. It prevents parties who have made a promissory note, after it has become due according to the time written therein, from making the defense that it is not due by reason of a parol promise to extend the time, which promise would depend upon the credibility of interested witnesses.” This case is authority for the rule that an oral agreement extending the time within which a condition precedent is to be performed cannot become executed until the time itself has lapsed. In other words, that the pretended oral agreement entered into between the plaintiff and the defendant in error in this case, by which the plaintiff in error obligated itself to put on the extensions upon the bull wheels, did not become executed until at least the 17th day of May, which was the time when these extensions were in fact put on. The

17th day of May was long past the fifth day upon which the defendant was to decide, and therefore it was not possible for the oral agreement which the defendant claimed was entered into prior to the expiration of the fifth day to have been an executed oral agreement. Another case decided by the Supreme Court of California, and interpreting section 1698 of the Civil Code, is the case of *Platt v. Butcher*, 122 Cal. 634.

This was an action by a real estate broker to recover commissions upon the sale of real estate. The contract of employment was in writing, and by its terms was to remain in full force and effect until September 1, 1885. A short time prior to that date by parol agreement, the time for performance was extended, and during such extension of time the broker found a purchaser for the land and a sale was made.

In the decision the court makes use of the following language:

“The parol agreement in this case was a covenant to extend the time for the performance of a certain contract. If that covenant be construed as one in effect covering all the terms of the original written contract, then it was not an alteration or variation of that contract, but the creation of a new one, and to be valid should have been in writing. If the covenant be simply and solely one extending the time for the performance of a prior written contract, it cannot be that oral agreement spoken of in section 1698, for it is not the original contract as altered, which must be executed, but the oral agreement alone, and an oral agreement simply extending time cannot be executed, for there is nothing to execute. No affirmative action is required. Such an agree-

ment calls for nothing to be done, and expires by the mere lapse of time. Another view of this matter, even more conclusive against plaintiff's contention, presents itself. An oral agreement does not alter a contract in writing unless it becomes an *executed* oral agreement. The oral agreement relied upon in this case was not valid when made for it was not executed at that time. According to plaintiff's claim, it was not executed until months after September 1, 1885, the time fixed for the expiration of the original contract itself. Upon September 1, 1885, the written contract expired by express provision, unless some valid agreement then in existence kept it alive, but at that time there was no valid agreement in existence. The oral agreement was no agreement until executed, and it was not executed until long after that date, and when executed there was no existing contract in writing which might or could be altered. The date when an oral agreement takes effect as altering a written contract is the date when it is executed. It then has the same effect as an agreement in writing of that date altering the original contract."

We insist that this case is authority for our position when we contend that the alleged oral agreement between the parties in the case at bar, to-wit: the agreement to furnish the extensions did not become executed prior to the expiration of the fifth day. The oral agreement was no agreement until executed, in the words of the Supreme Court in the above case, and if it did not become executed until after the expiration of the time within which the defendant was to decide whether the engine was sufficient and adequate for his needs it

was not an executed oral agreement sufficient in form to vary or modify the terms of the written contract itself.

Upon the second assignment of error presented [page 112, original certified record; bottom page 113, Transcript] we have only this to say, that if it was error to permit the introduction of oral testimony to alter or modify the terms of a written contract, as set forth in the first assignment, it was also error to permit the introduction of the same testimony, if the effect was to prove an oral waiver of a written five-day limitation. It matters not whether it be a modification or a waiver,—it must be in writing in either case, unless executed.

The third assignment of error [page 112, original certified record; page 114, Transcript] presents the ruling of the trial court upon an objection to testimony as to representations made prior to the execution and delivery of the written contract. Defendant in error was permitted to testify that a printed circular was shown to him by the agent of plaintiff in error, prior to the signing of the contract, and used by the agent in the negotiations to induce him to sign up, and the circular itself was offered in evidence over objections [page 67, original certified record; pages 66 and 67, Transcript]. It was error to permit this testimony because the answer did not allege either that there were misrepresentations by the agent, or that defendant in error was induced to enter into the contract by the fraudulent representations that the speed of the tractor would be greater than it actually was. The contract required plaintiff in error to furnish an engine which

would "prove adequate for your work," and the answer was founded on the theory that it was not in fact adequate, and on no other theory. On another occasion the court permitted defendant in error to testify, over objection, as to a representation as to the speed of the tractor, made to him prior to the execution of the contract [page 62, Transcript]. This was error because the written contract superseded all prior negotiations and no evidence other than the contents thereof was permissible, unless it was alleged that such representation was falsely or fraudulently made to induce the making of the contract, and this the answer did not allege.

Upon the fourth assignment presented [page 113, original certified record; page 114, Transcript], nothing additional need be said. The error assigned was the ruling of the court permitting oral testimony as to certain other representations made prior to the execution of the written contract, the pleadings not presenting an issue of fraud or mistake.

The fifth and sixth assignments present the ruling of the trial court in permitting testimony showing a modification of a written contract by an agent beyond the scope of his authority. This was error. Plaintiff in error moved to exclude the testimony unless it was followed by proof, establishing the authority of the agent. [Page 701, original certified record; page 69, Transcript.] Defendant in error failed to offer this proof. The motion should have been granted, and the ruling of the court, denying the motion, was error.

The seventh assignment presents the special finding of the trial court to the effect that plaintiff in error, by its conduct and representations, waived the right to require defendant in error to decide on or before the fifth day whether the tractor was adequate for his needs. In addition to his written conclusions, the court made a special finding upon this point [No. 7, bottom page 31, Transcript] and we have presented this special finding as error, in a separate assignment, in addition to the first and second assignments, presenting the same question upon the admission of the testimony which supported the special finding. What has been said above in argument upon the first and second assignments will apply here, without repeating the same at length.

The eighth, ninth and tenth assignments present error in holding that there was a breach of warranty by plaintiff in error as to the covenants of the written contract. The contract contained this clause "above engine is sold with the understanding that it proves adequate for your work." We believe the testimony conclusively showed that it was adequate for the work of defendant in error. It is true that the question whether it was in fact adequate is a question of fact, and we know that this Honorable Court will not disturb the ruling of the trial court upon a question of fact, yet we understand that where there is no evidence, or not sufficient evidence to support a finding, the appellate court will review the testimony to determine whether the trial court erred in its finding upon a particular point. The trial court found that plaintiff in error

agreed to furnish a tractor "adequate for the needs" of defendant in error, and that the tractor furnished was not adequate, and that therefore there was a breach of this covenant. We sincerely believe that there was no evidence that the tractor was inadequate and if there was no evidence to support this finding, the appellate court will inquire into, consider the testimony, and determine the question.

That there was no evidence of inadequacy is best shown by the testimony of defendant in error himself, and his testimony shows, unwittingly perhaps, that it was entirely adequate for his needs. Without repeating at length, he says that he had 1500 acres, or a little better, of land, to be summer fallowed. That he bought the engine March 25th and it was delivered at his ranch April first. That he used it continuously until June 13th, except during such time as it was broken down and defective parts were being replaced. That he bought it, expecting to use it day and night and to that end employed a day man and a night man to operate it; that because of defective material, it was out of commission from April 3rd to April 10th, and from April 22nd to April 27th, and from May 1st to May 17th. Deducting the days it could not be used from the number of days from April 1st to June 13th, leaves forty-six days during which it was in good condition and ready for use.

If it be true, as he claims, that he had 1500 acres to summer fallow, and if it be also true, as is the fact, that he had 46 days within which to do this work, it is a matter of mathematical calculation only to deter-

mine that the work could be accomplished at the rate of between 32 and 33 acres per day. Assuming for the sake of argument only, that it was true, as contended by him, that the engine when in the field and pulling two gang plows did not operate at a speed in excess of $1\frac{1}{4}$ miles per hour, this would be a distance of 6,600 lineal feet. He testified that his plows were six-gang plows with 8-inch shares. If there were six gangs in each plow and each share was 8 inches wide, then the plow when in operation would cover a space of 48 inches, or six times eight. Two plows would cover a space of twice this amount, or 96 inches, or 8 feet. Multiply the lineal feet covered by the engine pulling the plows at the rate of $1\frac{1}{4}$ miles per hour, or 6,600 lineal feet, by 8 feet, and we have 52,800 square feet as being the area of ground which could be plowed by this engine pulling two plows only, providing each plow contained six gangs, and each gang or share was 8 inches wide. An acre of ground consists of 4,840 square yards. There are 9 square feet in each square yard, or 43,560 square feet in an acre. If we divide the number of square feet in an acre into the number of square feet which the engine traveling at the rate of 1 mile per hour, and pulling two plows only which were 8 feet in width, will plow, a total of 52,800 square feet, we have an engine which is able to plow about $1\frac{1}{4}$ acres per hour. There are 24 hours in a day, and this engine should therefore plow 30 acres for each working day according to the testimony of the defendant himself.

Having 1500 acres to plow, and 46 days within which to do that plowing, that it was only necessary for de-

defendant in error to plow between 32 and 33 acres in order to accomplish his work. The difference between the 30 acres which could be plowed by the engine, if it only accomplished its work at the rate of one acre per hour, and 32 acres which it should have accomplished in order to plow the entire 1500 acres in 46 days, is easily made up by the use of one more gang plow. He admitted that the engine was capable of pulling three plows the same as it did pull two plows. If he had used three plows, as he might have done, and as he admits the engine was capable of pulling, he could very easily have plowed the entire 1500 acres within the time which was at his disposal. We have thus demonstrated that this engine was adequate for the defendant's work, and we have demonstrated this fact conclusively from the testimony of the defendant in error himself. We submit, therefore, that the tractor was entirely adequate and that there was no breach of warranty in that respect and that the trial court erred in so holding.

This completes the assignments of error as presented by the record. We believe the errors assigned were rulings erroneously made upon material questions, and that the judgment should be reversed. Aside from the questions of law involved, equity and reason favor a judgment for plaintiff in error, rather than for defendant in error. His only complaint against the tractor was that it did not make speed enough and yet the undisputed testimony upon the trial showed that he plowed nearly 600 acres of his ground, after he discovered this fact. This use of the tractor by him made

it a second-hand machine. It is not fair nor right that he be permitted to do this and then turn it back to plaintiff in error and refuse to pay for it. The judgment of the trial court should be reversed and a new trial ordered.

Respectfully submitted,

STUTSMAN & STUTSMAN,
Attorneys for Plaintiff in Error.

SA Stutsman
Of counsel

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Fairbanks, Morse & Company,
a corporation,

Plaintiff in Error,

vs.

J. M. Nelson,

Defendant in Error.

REPLY BRIEF

STATEMENT OF THE CASE.

The parties to this action entered into a written contract for the sale by plaintiff in error and the purchase by defendant in error of a machine known as a 30-60 horse-power tractor, for the sum of \$3600, evidenced by three promissory notes for \$1200 each. The contract provided that "above engine is sold with the understanding that it proves adequate for your work. For the purpose of testing out engine, we agree to furnish competent man for 2 days within 10 days of re-

ceipt of engine at Alessandro. This man to operate and demonstrate the engine regular working hours during his stay on your place. On or before the 5th day you agree to decide whether engine complies with your requirements or not." (Transcript, page 91, original certified record, pages 88-89). The machine was purchased for drawing a combined harvester as well as for plowing. (Transcript, page 58, original certified record page 60; also Transcript page 71, original certified record page 70). The machine was sent to Alessandro station in Riverside County, April 1, 1912, and the time from 2 p. m. until 7 p. m., that day, was consumed in moving it from the station to the ranch of defendant in error. (Transcript, page 45, original certified record, page 48.) On April 2 the demonstration on the ranch of defendant in error began and continued until sundown and was resumed April 3 and continued until 4:25 p. m., that day. (Transcript, page 45, original certified record, pages 48-49). During the alleged test numerous difficulties arose; the ground was wet in places; the wheels of the engine made deep depressions in the field; the wheels slipped; it was necessary to put stones and cactus under the wheels and to take off one of the gang-plows, and to jack up the other plows in places. Defendant in error called attention of the representative of plaintiff in error to these matters and the latter stated the difficulties could be overcome by putting wide extensions on the wheels so as to give them greater bearing on the ground. (Transcript, page 59, original certified record, pages 60-61). He also stated he would hurry home to telegraph for the

extensions. (Transcript, page 60, original certified record, page 61). He also stated defendant in error should have disc plows. (Transcript, page 61, original certified record, page 62). Reuland, the representative of defendant in error, denied on the stand that these extensions were promised, but the fact remains undisputed that the extensions were furnished and that without cost to the defendant in error. (Transcript, page 61, original certified record, page 62). Numerous breaks on the machine occurred and its use was interrupted frequently for long periods until May 17, when the extensions were put on. (Transcript, page 62, original certified record, pages 62-63). Defendant in error continued to do the best he could with the machine because Reuland told him to. (Transcript, page 71, original certified record, pages 70-71). No better results following the use of the extensions, defendant in error ordered new disc plows in accordance with Reuland's suggestion and they arrived and were attached May 28. (Transcript, page 62, original certified record, page 63). Still the machine did no better and defendant in error on that day telephoned a complaint to plaintiff in error asking that a man be sent to see about it. (Transcript, pages 63-64, original certified record, page 64). He notified them again on June 4th, and on June 7th without satisfaction, and finally on June 14 wrote and notified them he was ready to help load it on the cars according to contract. (Transcript, page 65, original certified record, page 65.)

Plaintiff in error sued upon the contract and notes,

and upon the issues presented on the trial, the District Court found in favor of defendant in error and judgment followed that plaintiff take nothing and defendant recover his costs.

POINTS AND AUTHORITIES.

The first assignment of error urged by plaintiff in error relates to the introduction of oral evidence to alter or modify the terms of a written instrument, as plaintiff in error claims. He urges that this is in violation of Section 1698, Civil Code of California. It is a curious position for the plaintiff in error to take. The contract required a two days' test of the machine on the ranch of defendant in error. The undisputed testimony was that no test was made on Nelson's (defendant in error) place, except on April 2 and April 3. The demonstration stopped about 4:30 the afternoon of April 3, although the test was to be "during working hours," and after the demonstrators left, work continued on that day until the machine broke down, showing that working hours were later than 4:30 p. m. (Transcript page 61, original certified record page 62). Plaintiff in error claims to be excused from the full test required by the contract because of a conversation occurring between Nelson and Reuland just before the departure of representatives of plaintiff in error. (Transcript page 46, original certified record page 49; also testimony of McDearmon, Transcript page 49-50, original certified record page 52; also testimony of Nelson, Transcript page 60-61, original certified record page 62). Yet while claiming that this oral conversa-

tion was a waiver of the contract provision for a full two days' test required of plaintiff in error, the claim is made that there could be no waiver of any provisions of the contract making requirements of defendant in error.

In a large number of authorities that we cite later in this brief on the point that retention of a machine beyond the stipulated time is excused when such retention is induced by promises and representations of the seller, a large proportion hold that such conduct on the part of the seller is a *waiver* and is not a variation of a written instrument by parol. The decisions of this state are to the same effect, the latest case on this particular point being

Luitweiler etc. Co. v. Ukiah Water Company,
16 Cal. Appeals 198,

where it is stated on pae 208:

"The delay in the rescission of the contract has also been adverted to and was excusable for the reasons mentioned. 'If the return of the machine warranted to do good work and found upon trial to be unfit for use is delayed at the request of the manufacturer, he thereby waives the right to require prompt delivery by the purchaser on discovery of the fact that it does not do the work guaranteed.' (Fox v. Stockton etc. Works, 83 Cal. 333, 23 Pac. 295). The buyer's retention and use of the article *beyond the stipulated time* will not operate as a waiver of the benefits of the warranty when it was at the instance of the seller or

his agent or when it was for the purpose of giving the seller or his agent an opportunity to remedy defects. (30 Am. & Eng. Ency. of Law, p. 188)”

That there can be such waiver, and that it is not in conflict with the provisions of Section 1698, Civil Code, is discussed in

Knarston v. Manhattan Life Ins. Co., 140 Cal.,
page 57.

On pages 62 and 63 of this opinion this particular point is discussed, and we particularly call attention to the following extract from the opinion:

“The provision of the code, as well as the stipulation for a forfeiture in the policy, were equally matters of benefit to the company, and it is the rule, that not only provision in a contract may be waived by the party for whose benefit they are inserted, but that he may also waive statutory, and even constitutional provision, under which he may derive a benefit. ‘It is a well-settled maxim that a party may waive the benefit of any condition or provision made in his behalf, no matter in what manner it may have been made or secured.’ (Broom’s Legal Maxims, 547.) ‘It extends to all provisions, even constitutional and statutory, as well as conventional. The law will not compel a man to insist upon any benefit or advantage secured to him, individually. Hence it was the privilege of the insurers in this case, if they elected so to do, to waive the condition making the actual payment of the premium a condition precedent to the binding efficacy of

any insurance as it was a provision inserted for their benefit, and in which they alone were interested. This waiver may be established by evidence of an express waiver, or by circumstances from which such waiver may be inferred; and it may be by the managers of the company, or by a duly authorized agent; and as it was done by the latter in this case, it was obligatory upon the company."

While this is an insurance case where forfeiture, on account of non-payment of the premium, was waived, yet it shows the attitude of the Supreme Court of California on this question of waiving a provision beneficial to the party making the waiver and, as stated above, a large proportion of these threshing machine and agricultural cases refer to such circumstances as a *waiver*.

The voluntary offer to put on extensions, followed by the actual furnishing and attachment of them to the tractor without cost to the defendant, was an admission on the part of plaintiff that their machine was not a complete machine; that it was not in condition to be tested. Such action was a waiver of any action required of the defendant. So were the representations as to the disc plows and the promises to send a man to test the machine. Anything that led the defendant in error to a belief that the seller would make the tractor comply with the warranty as to adequacy, and which led him to refrain from an immediate rejection of the machine, was a waiver of the requirement that he rescind the contract or reject the machine within a certain time. We believe that it is abundantly shown

throughout the entire record that defendant in error was deterred from a rejection of the machine by the statements, promises and representations of the agents of the plaintiff and that therefore any delay that there may have been in rejecting the tractor was excused, the company having waived its right to exercise of the defendant's option to keep or to reject the machine within a certain period.

As contended by us, the machine was not complete, and it was conceded by the plaintiff that it was not when they promised to send and did send extensions in an effort to improve the speed and keep it from sinking into the ground, and as pertinent to this point we desire to cite the case of

Sherman v. Ayers, 20 Cal. App. 733.

decided by the District Court of Appeals for the Second Appellate District, on December 28th, 1912. The court holds that

“It is contended by appellant that a clause in the contract provided that operation should constitute acceptance, and that the use by defendant for a short time of the engine was tantamount to an acceptance. It is true that such contract did provide that operation should constitute acceptance, but it certainly appears that no operation *after a complete performance of the contract* is shown. On the contrary, the whole of the operation, either by the employes of plaintiff's assignors,

or by defendant after they left, was in an effort to procure, of possible, information as to any existing defects, and to determine whether or not the same could be made to operate. The evidence does not disclose such an operation as, under the authorities cited, constitutes an acceptance. The case of *Jackson v. Porter Land & Water Co.*, 151 Cal. 33, relied upon by appellant in support of the proposition that the operation was equivalent to an acceptance, is not an authority under the circumstances of this case. In that case the party had contracted for an engine of certain horse-power; it was installed with lesser horse-power; the purchaser had knowledge of that fact and with such knowledge commenced and continued the operation of the pumping plant during an entire irrigating season, and then for the first time raised the question as to the horse-power which should have been furnished. In the case at bar the defects were apparent, were recognized and the attention of plaintiff's assignors was called to them. The operation was not one, under the circumstances, *after completion* and was not such as would justify a court in saying that the machinery had ever been operated, or that the attempt at operation was the equivalent of acceptance."

On the general question of whether the conduct, statements and representations of the plaintiff's agents were such as to excuse a failure to return the engine within five days, the authorities seem to be abundant that under circumstances such as have been shown in this case the delay is excused.

The case of Luitweiler etc. Co. v. Ukiah etc. Co., 16 Cal. Appeals, page 198, is one that presents many features of similarity with the case at bar. The reported case is quite lengthy, but a perusal of it will show that in its essential features it did not materially differ from our case. In that case a pump was purchased by the defendant from the plaintiff. It was delivered late in May, 1907, and was not put in operation until about the middle of October of that year. When it was put in operation the defendant sent a portion of the purchase price and later made complaint that the pump did not mee the warranty. There was much correspondence between the two companies, the pumping company suggesting various methods to overcome the defects complained of. The suggestions were adopted but without success. The water company used the pump for about three months. No written offer to return the pump was made until after the commencement of the suit, and it is stated on page 203 "the delay and continued use of the pump were due to the hope that the difficulties might be overcome and the pump so adjusted that it would do the work."

The Court in the opinion discusses the rule to which we have referred, and it is set out in the syllabus as follows:

"Delay in Rescission Excused—Warranty not waived.—The delay in the rescission of the contract was excused under the circumstances in proof, where it was at the request of the seller or his agent for the purpose of giving them an opportunity to remedy de-

fects, and the warranty was not waived by such delay.”

We also desire to cite on this point:

Fox v. Harvester etc. Works, 83 Cal. 333.

In this case the syllabus states the rule as follows:

“Return of Unfit Machine—Waiver of Delay—Pleading.—If the return of a machine, warranted to do good work, and found upon trial to be unfit for use, is delayed at the request of the manufacturer, he thereby *waives* the right to require prompt delivery by the purchaser on discovery of the fact that it does not do the work guaranteed.”

In the above case two combined harvesters were sold for \$3600.00, and the warranty was that they would do good and satisfactory work. The complaint alleged that the machines wholly failed to do satisfactory work during a greater part of the harvest season of 1884; that the purchaser expended large sums of money and lost valuable time in attempting to make the machines meet the warranty. They further alleged that they returned the harvesters immediately *after becoming fully satisfied* that they were not capable of doing good and satisfactory work, and the suit was for damages and return of the purchase money. The principal questions decided came up on the questions of instructions and the Supreme Court affirmed the decision, which was in favor of the purchasers of the machines. The instructions criticised, but which the Supreme Court approved, were to the effect that if the jury found that the guarantees had been made, and that a proper ef-

fort had been made to operate the machines in the harvest field and that they did not substantially do the work warranted, and that after plaintiffs were satisfied of such failure, the plaintiffs returned such machines to the defendant, that the verdict should be for the plaintiff.

In our case we claim that the evidence abundantly shows that Nelson offered to return the machine just as soon as he became satisfied that the company could not or would not make the tractor do the work which they had warranted.

Another instruction, also approved in the Fox case, was as follows:

“If, at the request of one of defendant’s authorized agents, the plaintiffs did not return the machines until the spring of 1885, then the defendant *waived its right* to require the prompt deliver of the machines to the defendant on the discovery by the plaintiffs of the fact, that the machines did not do the work the defendant guaranteed they should do.”

So far as we have been able to discover there has been no modification of this rule by the Supreme Court or the Appellate Court of California.

In the opening brief of plaintiff in error there is an attempt to draw a distinction between the case at bar and the case of Knarston v. Manhattan Life Insurance Company, 140 Cal. 57, to which reference has been made hereinabove. The claim is made that, be-

cause in the Knarston case the policy did not require an affirmative act on the part of the assured, the case is distinguishable from this case, but it should be remembered that the decision in the Knarston case turned on the fact that the law is that a party can waive a provision that is for his benefit, whether it be constitutional, statutory or contractual, and it makes no difference whether there are reciprocal obligations in that respect or not. The provision limiting the time within which defendant in error could reject the machine was one made for the benefit of plaintiff in error, and was therefore one which it could waive. An examination of the Knarston case will fully disclose this. The Court says that the insurance company "entered into negotiations with the insured, treating the policy as still in force, and evidencing an intention to waive any right it might have to insist upon the forfeiture." In our case the plaintiff in error treated the contract as still in force, negotiated with Nelson, furnished these extensions, sent its agents and mechanics out to his place numerous times, and corresponded with him, all being in an attempt to make the machine do what plaintiff promised it would do.

We also call attention to the conclusions of the trial court (Transcript pages 37-41). Especial attention is called to the opinion of the trial court on the point under discussion found on page 38 of the Transcript. What we have said herein is also a sufficient reply to the discussion in the brief of plaintiff in error of the cases of *Hennehan v. Hart*, 127 Cal. 656, and *Platt v. Butcher*, 122 Cal. 634. Our position is that the evidence

to which objection is made was not for alteration of a written contract, but was evidence of a waiver of a provision for the benefit of plaintiff in error.

In the cases hereinbefore cited and those which follow in this brief, the courts continually refer to such circumstances as existed in this case as constituting a *waiver*, and we believe that our case has fully been brought within the rules thus announced by the courts.

We desire to call the court's attention to a number of cases which have been decided in the Courts of other states under similar contracts for the sale of machinery to be operated, but having, some of them, practically the same provisions contained in the contract before the court, and some of them other provisions of similar nature relative to the manner of determining whether or not the machines comply with the warranty, and as to the manner and time of determining such cases. In many of these cases the attempts on the part of the company and the purchaser extended through many months.

These cases in principle and in their facts apply to this case and the provisions of this contract relating to the return of this machine in case of failure of warranty. We desire to quote somewhat fully doctrines from a few of these cases and will cite many others, each of which we have fully examined, and all of which throw light on this question as to what is expected and required legally of a purchaser under circumstances as is detailed in the evidence in this case. The first of these cases to which we call attention is

Advance Thresher Co. v. Vinckel, 121 N. W. 432.

(Quoting from the syllabus). "The fact that notice of failure of the machine to fulfill the requirements of a printed warranty is not given in the manner provided by the contract is no defense against an alleged breach of warranty, where vendor under such notice as is given him by the vendee undertakes to remedy the defects complained of by the latter."

"Where a contract for the sale of a machine provides that a retention thereof by the vendee beyond a given period will operate as a waiver of defects, held to be inapplicable where the vendor induced the vendee to retain the machine under a promise that defects should be remedied."

In this case the machine in controversy was a threshing machine.

The terms of the contract as quoted by the Supreme Court in this case were as follows:

"That the separators if properly run and rightfully managed are not excelled by any separator manufactured of the same size in their adaptation for separating and saving from the straw the various kinds and conditions of grain and seed. * * * That upon starting the machinery and the purchaser using the usual care and skill of threshermen, is unable to make the * * * thresher * * * to operate well, he shall within five days from the day of the first use, give written notice to the company at Battle Creek, Michigan, by registered letter, stating * * * wherein it fails to fill the war-

ranty, and, also, within said time, shall notify the agent through whom he purchased, and a reasonable time shall be allowed them to get to the machine and remedy the defects, * * * and longer use or without notice is to be a fulfillment of all warranty.”

Considering the questions as involved in the case the court in its opinion says:

“It has been held by this and other jurisdictions that where the vendor, by its agents, sends machine men or experts to the scene of trouble for the purpose of trying to remedy the defects complained of, that the service of notice in the strict manner pointed out by the contract is thereby *waived*, no matter by what means the vendee caused notice to be conveyed to the company or to its duly authorized agents. It has come to be a familiar rule of construction where applied to contracts prepared by the vendor for his own protection that such contracts will be construed most strongly against him.” (Citing numerous Nebraska cases and the case of *Buchanan v. Minneapolis Company*, 116 N. W. 335, N. D.)

We claim that there was no proof before the court which establishes that a test was ever made or pretended to have been made by the plaintiff for two days, in accordance with the terms of our contract.

On the contrary the evidence shows that the machine was to be demonstrated “regular working hours during his stay on your (defendant’s) place.” (Transcript page 91, original certified record, page 89.) That de-

fendant expected to work night and day (Transcript page 58, original certified record, page 60-61); that it was after nine o'clock in the forenoon of the first day when operations at defendant's place started (Transcript, page 58, original certified record, page 60); that it was 4:30 o'clock in the afternoon of the second day's work at defendant's place when the plaintiff's representatives left (Transcript, page 61, original certified record, page 62). This was several hours short of the two days' demonstration for which the contract provided. Further, it was practically conceded by the plaintiff's representative, Reuland, that the machine was not in proper condition at the time and that the extensions for the bull wheels were required and should be attached to make the machine adequate for defendant's work. Defendant called Reuland's attention to the deep impressions made by the bull wheels "and he said we should overcome that by putting extensions on." (Transcript, page 59, original certified record, page 60). That the demonstration did not continue for two days during working hours upon defendant's place is further shown by the fact that work was continued the second day after plaintiff's men left (Transcript, page 61, original certified record, page 62). The extensions mentioned by Reuland were procured and attached without any charge being made against defendant) Transcript, page 61, original certified record, page 62) which is very persuasive of the fact that the plaintiff did not regard its machine as complete and ready for demonstration without them. Their contract did not require them to fur-

nish additional parts, but only defective parts, so that when they did furnish additional parts, it is conclusive that they should have been originally included in the machine.

From that time forward plaintiff never did attempt to make any test, as specified in the contract, of the machine so materially altered, and never at any time after those extensions were placed on the machine, for two days, or even half a day, remained with that machine for the purpose of testing it out in response to the demands and claims of the defendant.

In the case to which we have referred the court further says:

“The plaintiff makes complaint that the defendant kept the machine beyond the time permitted by the terms of the contract after the discovery of the alleged defects. This and other jurisdictions have held that where the vendor or his agent induces the vendee to keep a defective machine upon the promise of putting it in condition to do effective work, the vendor thereby *waives* the condition which provides that to keep the machine beyond a certain time is a waiver of the warranty by the purchaser. This is a reasonable rule, and we are not disposed to find fault with it. The record shows that on several occasions the plaintiff not only sent practical threshermen to the machine for the purpose of trying to repair it and to put it in working condition, but that on at least one occasion, as the defendant testified, one of the authorized agents of the plaintiff induced the former to retain the machinery

upon the promise of repairing it. This was denied by the plaintiff's agent; but the testimony upon this point, as upon others, was fairly submitted to the jury. But in any event, it is fairly established by predonderance of the evidence that the plaintiff, by its agents and skilled workmen, made an honest endeavor to put the machine in good working order, but failed to do so. This circumstance serves in a measure to corroborate the contention of the defendant that the retention of the defective machine by him was at least with the *implied*, if not express, agreement that the defects would be remedied by the plaintiff, and we are not disposed to hold from the testimony as disclosed by this record that the defendant waived any right conferred upon him by the contract in retaining the possession of the machine under the circumstances shown by the evidence."

We next call the court's attention to a case in the state of Tennessee:

Garr, Scott & Co. v Stark, 36 S. W. 149.

In this case was involved a contract for a threshing machine, dated April 5th, 1889, with warranty, and time one week for a test of the machine. In case of failure the contract provided for notice to the company and their agent and required the purchaser to allow them time to remedy the defect and also to render friendly assistance. It further provided that if the machine could not be made to fill the warranty the purchaser to return it to the place where received, and further provided that more than one week's use was to be considered an acceptance of the machine, title of the

same to remain in Garr, Scott and Company until paid for. The machine was delivered at Gallatin, Tennessee, about April, 1889. At the time the machine was delivered the defendant noticed some defects in the machine and that some tools were missing, and these defects were called to the attention of the agent who said the company would make good this or any other defects there were about it. The machine was put in operation under the direction of an expert of the company and his attention was called to some of these defects, but he stated that the defect would not be serious, but if anything was wrong the company would fix it, and he agreed to notify the company of it. The expert could not remain to get the machine to work successfully. The machine was tried by defendants for parts of three seasons but they were never able, though they had it in the hands of suitable and experienced men, to make it work successfully and could never work it except at a loss. It had proper use and management and it did not work better nor equal to any first class machine made for doing the same work. In fact it would not work at all except at a loss to those owning and using it. It was not fit and suitable for the purpose for which it was sold; was broken; rotted in parts; badly adjusted and defective. The defendants attempted to run the machine a part of three seasons but disastrously each time, and were only able to thresh a few crops each season, and those at a loss and not well done, and had to abandon the effort each time, and finally laid aside this machine to get another, which they did. The presentation of the facts by the

court extends through several pages of the report. We have only given a portion of them, and the various claims that were made by the company, very similar to what is made here, were insisted upon, especially as to the delay in returning the machine and their alleged failure to make complaint, also considered by the court.

With reference further to the provisions of the contract, very similar in many respects to the one before the court, the following language was used, referring first to the case which has been cited as sustaining the plaintiff's contention:

"That case, however, is, in our opinion, applicable to one phase of this case, the principle decided being that parties are remitted to the remedies and measures provided for in the contract. The contract in this case that if the machine did not work, the plaintiff, on notice, which it had, had the right to remedy the defects, which it did not do, and, in case it failed to do so, defendants were to return the machine, which they finally did. But, under the stipulations of this contract, defendants would have no right to spend money on this machine and charge same up to plaintiff, nor to run it at a loss and recover such as damages against plaintiff. This, as we take it, was exactly one of the contingencies intended to be provided against if the machine would not work. The remedy was to return it, not to run the plaintiff in debt by the unauthorized use of it. A retention of the machine awaiting repairs, or for further trial, whether by mutual agreement or at special request of plaintiff's attorney, could not, we think, ren-

der defendants liable for the entire price, nor make plaintiff responsible for repairs it did not authorize, nor losses and damages it did not contemplate.”

The above case was decided in the Court of Chancery Appeals of Tennessee and was affirmed orally by the Supreme Court of the state on December 20th, 1895. It is a suggestive case in this instance and demonstrates how fully the courts have been inclined to protect parties against these contracts where they have in good faith given the companies every opportunity to try to repair and adjust their machinery so as to make it comply with their agreement, and how fully the courts have endeavored to protect purchasers from the strict construction of the contracts claimed by counsel for plaintiff as applicable in this particular case.

We were somewhat surprised at such claim in view of the facts, especially that the agent of the company sent to supervise what they claim was a test of the machine, when noticing that the machine was not working properly, but was sinking into the sand and into the soil, declared that it was possible for the machine to work properly and proposed himself to send for these extensions, weighing about 2400 pounds, and to have them placed on the machine in order to overcome this failure and defect. (Transcript, page 59, original certified record, page 60). This same promise was made by the selling agent, Henry Reuland. (Transcript, page 61, original certified record, page 62).

There is no question but what defendant had a right

long before those extensions came to have notified plaintiff to take that machine away and that he was ready to assume the burden of helping to load it on the cars and pay the freight on it back to Los Angeles, but he stood on no such legal right but waited patiently to give the company an opportunity to try to make its guaranty good, believing of course that the representations of the agent would improve and correct the slow movement of the machine.

Kinney v. Bevilheimer, et al., 64 N. W. 215,
(Ind.)

A grain separator and stacker was the machine constituting the subject matter of this action. In this case was involved the question of retaining the machine in the possession of the buyer after it was found to be defective and unfit to do good work, and after the vendor had attempted to repair or perfect it. The findings also disclosed the fact that in keeping the machine in their possession the vendees acted upon the request of the seller's agent, who promised that the machine would be made to work. The case is suggestive and in this respect applicable to the case before the court.

Springfield Engine & Threshing Co. v. Kennedy,
(Ind.), 34 N. E. 858.

In the above case the contract was for a steam vibrating separator and attachments. It has involved in it the element of waiver, as involved in this case, and lays down rules with reference to the conduct and acts

of agents in this class of cases, which are fully applicable in this case before the Court.

South Bend Pulley Co. v. W. E. Caldwell Co.,
(Court of Appeals of Ky.) 55 S. W. 208.

In the above case there was a guaranty of the machinery and more or less correspondence in regard to failure of warranty and defects in machines, and finally an offer to return the goods; and the question was left to the jury as to whether the offer was made within reasonable time, and this notwithstanding the fact that the offer to return the goods was not made for something like six months after the last letter which passed between the parties in regard to the appellant's liability on the warranty.

Massachusetts Loan & Trust Co. v. Welch, (Minn.)
49 N. W. 740.

This case presents long continued attempts on the part of the purchaser to operate a threshing machine; the subject matter of the controversy, with many promises and efforts and delays on the part of the company to so repair or adjust the machine as to make it comply with the guaranty, and the principal point in the case is stated in a portion of the syllabus No. 5, as follows:

“And where such agent, under his legal authority to make, or cause to be made, suitable repairs, has taken charge of the machine for the purpose of ‘righting it,’ and, upon experiment thereafter, it continues to work badly, and not as warranted, and the buyer, under his

direction, continues to use it in reliance upon his promise to fix it and put it in complete repair, which he fails to do, the buyer does not forfeit his right to recover upon the warranty by reason of the expiration of the time limited in the contract for the trial thereof before the repairs are fully made; and the subsequent recognition of the acts of its agent by the seller in attempting to complete the repairs as promised by him, will also be held a *waiver* of the strict terms of the warranty in respect to the trial of the machine.”

Roth v. Continental Wire Co. (Court of Appeals, St. Louis, Mo.), 68 S. W. 594.

This was a case of the purchase of machines by sample, and one of the questions decided was the following, reading from the syllabus:

“When the purchaser of machines by sample repeatedly complains to the seller that the machines are not satisfactory, and both parties attempt to remedy the defects, the retention of the machines by the purchaser, and his failure to rescind the contract, do not raise an inference that the machines are satisfactory.”

This case occupies a number of pages of the report, the case having been submitted to a referee, whose findings and conclusions are embodied in the decision, together with an extended consideration of the case by the Court of Appeals, and the case contains many helpful suggestions as applicable to this one.

Parsons Band Cutter & Self-Feeder Co. v Gadeke, (Neb.), 95 N. W. 850.

This case was an action brought to recover upon two notes given for the purchase price of a machine. Breach of warranty was alleged, and in the opinion the court lays down this doctrine:

“Defendants claimed that they kept the machine longer at the solicitation of the agent through whom it was purchased, and by reason of his repeated promises to make it fulfill the terms of the warranty. The court instructed that such facts, if shown, would operate as a *waiver*, and would preclude the plaintiff from insisting upon the conditions, which was in full accord with prior rulings of this court.”

D. M. Osborne & Co. v. McQueen, (Wis.), 29 N. W. 636.

This case has some of the features of the one before the court. In this case the defendant was not charged with an acceptance of the machine because he kept it beyond the time defined in the contract for the purpose of giving it a new and fair trial after it was repaired. The machine had been twice repaired prior to that time and the plaintiff had refused either to repair it again or to return the money paid on the note.

First National Bank v. Dutcher, 128 Ia. 413, s. c. 104 N. W. 497.

This case grew out of a written contract of date September 9th, 1901, for the purchase of a corn husking and shredding machine, with warranty, and requiring the purchaser to give written notice to the company, or

its local agent, if, after two days trial, the machine proved to be not as represented.

The case sets out notice of the failure of the machine and extended efforts on the part of the manufacturer to so operate the machine as to have it comply with the warranty, and the failure of these efforts. These acts and trials by different persons to try to adjust the machine extended on down until after December 24th, 1901, and at this time the defendant wrote a letter to the manufacturer informing it that its expert and agent had been laboring for weeks to make the machine do good work but without success, and that he requested him to keep on with the trial. The letter further states his discouragement and dissatisfaction with the results produced but offered to persevere in the trial if the company will remedy the defects complained of.

The court, on this question of the promptness in returning the machine, says:

“Now, so long as the appellant’s agents and experts continue to work the machine and hold out encouragement to the appellee that it would be made as warranted, we think he was justified in postponing its return.” (Citing authorities.)

“Those efforts continued down to within a short time before the return was actually made. About this time appellee, as we have seen, addressed the company directly, rehearsing his troubles with the machine, and asked that some one be sent direct from the house to

see it and make it good if possible. The answer was of a character to invite still further trial, and we cannot say as a matter of law that the returning of the machine five ays later was not in reasonable time."

This is well worthy of careful examination, and it lays down a number of rules of law applicable to this case which seem strictly in accord with justice, and which we think will aid the court in arriving at a just conclusion in this case.

First National Bank v. Erickson, (Neb.), 31 N. W. 388.

This case, being one relating to a harvester and binder combined, is one in which, by its facts as set out, the manufacturer waived the right to have return of the property within a time specified in the contract in case it did not give satisfaction.

McCormick Harvester Machine Co. v. McMuller, 95 N. W. 507.

The facts of this case set out the questions which the court submitted to the jury for the purpose of enabling them to arrive at their conclusion as to matters of fact, and among others was the question as to whether the machine did such work as it was warranted to do, whether the defendant gave it a fair and reasonable test or trial, and whether, if it did not do such work, the defendant, under the circumstances, used it for a longer time than he was justified in so doing, or within a reasonable time complied with his obligation to return it to the plaintiff.

Upon the second assignment of error counsel for plaintiff in error claims in his brief that it was error to permit the introduction of oral testimony to prove a waiver of the provisions in the contract with reference to the determination by defendant in error within five days whether the machine was adequate for his use or not. Our discussion of the first assignment of error in this brief has covered the ground raised in the second assignment of error, and it is unnecessary to here repeat what we have already said, but we merely refer to our discussion of the first assignment of error.

The third assignment of error refers to the admission of certain evidence over objection of plaintiff in error referring to a certain catalog shown to the defendant in error, and a statement made during the negotiations which led up to the contract.

In the case of *Luitweiler, etc. Company vs. Ukiah, etc. Company*, 16 Cal. App. 198, to which reference has already been made, an exactly similar question arose, and the court on page 210 of the opinion observed: "It was proper to allow Mr. Brush to state that he relied upon the representations in plaintiff's catalog. The question involved a very important circumstance and the buyer may be asked whether in buying he relied upon his own judgment or upon the seller's representations. (*Milwaukee Rice Machinery Company vs. Hamacek*, 115 Wis. 422; 91 N. W. 1010). The court of course would not be bound by his answer, but it should be considered with the other facts and circumstances in the case."

Moreover we do not believe that the rights of the plaintiff in error were in anywise prejudiced by the admission of such testimony as will be found from a perusal of the conclusions of the trial court set forth in the transcript, pages 37 to 41 inclusive.

Section 1856 of the Code of Civil Procedure provides that when the terms of an agreement have been reduced to writing it is to be considered as containing all those terms, and there can be no evidence of such terms other than the contents of the writing except where a mistake or imperfection is put in issue, or where the validity of the agreement is the fact in dispute, but the section goes on to state that "This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates as defined in Section 1860, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties." And also in Section 1860 of the Code of Civil Procedure the provision is made that "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

The contract provided that the tractor should be "adequate for your work." The testimony was that Nelson told them the machine would have to travel two miles an hour at least, and they gave him to understand

that it would have plenty and ample power to do so. (Trans. p. 63, original certified record, p. 64).

The evidence objected to was certainly competent to explain what the parties meant by the provision in the contract that the machine be "adequate for your work," it being necessary to determine first what the work was and what power or speed was required to do it, and we submit that the evidence was admissible for the purpose of explaining in some degree the language used, and also as putting the judge in the position of the parties, and as explaining the circumstances under which the language quoted was used. This position is sustained also in the case of *Balfour vs. Fresno C. & I. Company*, 109 Cal. 221-226, as well as in the *Luitweiler* case *supra*.

What we have just said upon the third assignment of error is equally applicable to the fourth assignment of error. The evidence was not offered in proof of any fraud or mistake, but for the purpose of explaining the language of the contract "adequate for your work," and of showing the circumstances under which the contract was made so that the trial judge could be placed in the position of the parties.

The fifth and sixth assignments of error relate to the question of whether the plaintiff in error was bound by the acts of its agents who visited the ranch of defendant in error unless followed by proof establishing the authority of such agents in that behalf. It is sufficient to say upon this question that there was full and ample ratification of the acts of the agents of the

plaintiff in error, Frank Reuland and Henry Reuland, in promising the extensions to the wheels. The extensions were supplied without cost to the defendant in error. (Trans. p. 61, original certified record, p. 62); also (Trans. p. 47, original certified record, p. 50).

We desire also upon this question to again cite the case of *Advance Thresher Company vs. Vinckel*, 121 N. W. 432. The court in this case says, with reference to the acts of the agents of these companies, as follows:

“To say that its agents were vested with the mere naked power to sell and deliver without any authority to waive or modify any term of the printed contract would be, as is well said in the *Pitsinowsky* case, 37 Ia. 9, to establish a snare by which to entrap the unwary, and enable principals to reap the benefits flowing from the conduct of an agent in the transaction of business intrusted to his hands, without incurring any of the responsibilities connected therewith.” (Citing authorities.)

Henry Reuland was the selling agent in this contract. (Trans. p. 55, original certified record, p. 57). He also made the promise about the extensions, as well as Frank Reuland, who operated the machine. (Trans. p. 61, original certified record p. 61). Also (Trans. p. 60, original certified record p. 61).

The seventh assignment of error relates to the finding of the trial court to the effect that plaintiff in error by its conduct and representations waived the right to require defendant in error to demand on or

before the fifth day whether the tractor was adequate for his needs. What we have already said in this brief upon the first and second assignments of error is applicable to the seventh assignment, and we hereby refer to the same without setting forth the same again at length.

The eighth, ninth and tenth assignments of error relate to the breach of warranty found by the court, and the claim is made by plaintiff in error that there was no such breach. The contract provided that "above engine is sold with the understanding that it proves adequate for your work," and our position is that the evidence shows that the tractor did not meet this requirement. While the defendant in error was made the judge of this, and he is not required to assume the burden of showing that it was not adequate, yet we contend that the evidence clearly shows that it was not. There is no evidence anywhere in the entire record that the tractor ever made a speed of more than one and a quarter to one and a third miles per hour in the field with the plows working. The only evidence upon this point is found in the testimony of Nelson (Trans. p. 62, original certified record p. 63); of Ferguson (Trans. p. 54, original certified record p. 56); of Dickerson (Trans. p. 73, original certified record p. 72); of Cell (Trans. p. 75, original certified record p. 73). There is ample testimony to show that in order to operate a combined harvester successfully a speed of two miles per hour or more is necessary. Nelson so testified (Trans. p. 63, original certified record p. 64). Dickerson testified to the same effect (Trans. p. 71, original certified

record p. 73), and so did the witness Cell at the close of his direct examination (Trans. p. 75, original certified record p. 73). The only attempt to controvert this evidence was through Cooks, but his testimony was shown to refer to a stationary engine and that he was not familiar with a machine in motion (Trans. p. 78, original certified record p. 76). It is also established that one of the reasons moving Nelson to the purchase of the machine was that it was to be used for harvesting as well as plowing (Trans. p. 58, original certified record p. 60). This is corroborated by Henry Reuland, the selling agent, who said "I gave him what the catalog says and that is all I know about it. I think he told me he wanted to pull a harvester." (Trans. p. 77, original certified record p. 75). We submit that the evidence therefore clearly shows that the tractor was not "adequate" for the work as was required by the contract. This is shown without any serious attempt at contradiction with respect to the harvester, as the evidence to which reference has just been made discloses, and these facts were ample to support the finding of the trial court as to a breach of warranty.

But we also claim that it was not adequate for the work with respect to plowing. It is shown that Nelson had 1500 acres of summer fallowing to do and that the season for summer fallowing should be finished by May 1st or before. (Trans. p. 58, original certified record p. 60). The testimony of Nelson, which is not contradicted in any place shows that the machine was operated on his place on April 2nd and 3rd for about one and one-half days, and that it then broke down; that it was then

used again beginning on the 16th of April and continuing to the 19th when a shaft broke, and a new one was put in on the 29th of April; the machine was then used again from April 30th for about a week, and was not ready for use again until May 17th, and was used then until May 28th when the disc plows were attached, and from May 28th to June 13th. Altogether this was a total of 34½ days. Sundays have been eliminated from this calculation because it was shown by Dickerson (Trans. p. 73, original certified record p. 72) that no work was done on Sundays, and in all the time that the machine was operated 585 acres were plowed (Trans. p. 71, original certified record p. 70), or an average of 17 acres every twenty-four hours. At this rate it would have taken nearly 100 days to summer fallow the 1500 acres, whereas the machine was not delivered until April 1st, and the work should have been completed by May 1st. A showing is thus made that Nelson failed to get over 900 acres plowed that season because the engine was not adequate for the work. Under the contract he is precluded from claiming damages suffered by reason of the failure of the engine. If the tractor had plowed approximately 50 acres per day the entire 1500 acres could have been finished within 30 days.

The evidence also plainly shows that the engine entirely failed to do any work at any speed on certain parts of Nelson's land. Dickerson testified that every once in a while they would strike a sandy place where they couldn't pull the plow and couldn't pull the engine out, and they would go around these places, which

would cut down the acreage a great deal. (Cross examination, Trans. p. 74, original certified record pp. 72 and 73). It is also shown that the sandy land is tillable and has raised crops. (Trans. bottom p. 59, original certified record p. 61). It thus appears that here is a positive showing, uncontradicted anywhere in the evidence, that the engine not only was not adequate for his work, but was an absolute failure to do any work on certain parts of the land. It may be urged that when this occurred it was incumbent upon Nelson to reject the engine at once, but as has been shown heretofore he was deterred from doing this by the constant promises and representations of the plaintiff that the extensions to these bull wheels or the change of plows would obviate the difficulties about which he was complaining to them. We contend that having by such promises and representations led the defendant to retain the machine for the purpose of giving an opportunity for it to be made good the plaintiff in error cannot take advantage of that and claim that he should have rejected the machine the moment he discovered anything at all that indicated that it was inadequate. In other words we do not believe that the plaintiff can take advantage of its own wrong in leading the defendant into a position where he could not reject the machine by making promises to him that it would be put in proper shape to become adequate for his work. It is our belief that there was no intentional misrepresentation in these promises but that all parties hoped and probably believed that the changes suggested would obviate the difficulties which were encountered, but it should be remembered that this is an experimental engine so far as operating it under

the conditions that prevail in California are concerned. It was admitted by Frank Reuland (Trans. top of p. 48, original certified record p. 49), and by McDearmon (Trans. p. 51, original certified record p. 53), that they had never seen a 30-60 horse-power oil tractor before this one, and that it was the only one that they ever saw operating in the field, and that the only place they ever saw it operate was at Nelson's place.

Plaintiff in error in its brief has indulged in a mathematical calculation to show that in 46 days the engine could have plowed approximately 1500 acres. The difficulty with this calculation is that it is based on wrong premises and assumed that the machine would make the *maximum* speed of a mile and a quarter an hour all the time drawing three gang plows, and working every hour, minute and second of the time. Another difficulty with the calculation is that it has been treated as a mechanical, scientific and mathematical problem, whereas Nelson's requirements were practical. We have heretofore shown that the time during which the engine was operated or could be operated was 34½ days, but plaintiff in error insists upon 46 days. This he obtains by including Sundays, and also apparently including the time from April 11th to April 16th, but there is no testimony to show that the engine was worked or could be worked during that time. The assumption is also made that no stops would be made for fuel, oil or water, or for lunch for the workmen. The calculation failing to show 32 or 33 acres per day, counsel claims that the difference could be made up by using one more gang plow, but the testimony was that it was necessary to

drop one plow at times because the engine could not pull three plows. (Trans. p. 52, original certified record p. 54). Also (Trans. p. 59, original certified record p. 61). The actual fact is that the machine worked for $34\frac{1}{2}$ days and plowed 585 acres, or an average of about 17 acres per day, and this did not meet the requirements of the defendant.

We believe that we have shown that the evidence amply justified the finding as to the failure of the warranty of the engine to be adequate for the work of defendant in error as to plowing in that it could not do the work within the time required; as to harvesting in that it could not make sufficient speed to successfully operate a combined harvester; and again as to plowing in that there were certain portions of the land which it would not plow at all, cutting down the acreage a great deal.

We have now discussed all assignments of error pointed out and believe that the trial court should be upheld in its conclusions and judgment.

Plaintiff in error in concluding its brief states that reason and equity favor a judgment for plaintiff in error rather than for defendant in error. In reply thereto we wish to say that the defendant in error refrained from rejecting the engine because of the representations, promises and statements of the plaintiff and its agents, and that he was led into a position which is now attacked because he trusted these people, and they

now say that he had no right to trust them. It should be recalled that this engine was an experimental engine; that the testimony clearly shows that no engine of this horse-power and particular design had ever been used in Southern California; and that neither of the men sent out to test and demonstrate this engine had ever seen one operate in the field before. It is very plain that this engine did not do the work and could not be made to do the work. Plaintiff in error says that the use of the machine made a second-hand engine of it. If this be true it would seem that it is a very poorly constructed machine if the use for 34 days of a \$3600.00 horse-power tractor would cause it to depreciate so much in value. As a matter of fact the tractor is worth nothing to the defendant. It would be ruinous to him to require him to keep it and pay the price that is asked for it, together with counsel fees, since it is absolutely worthless to him. We do not believe that plaintiff in error should be permitted to take advantage of the defendant in error because he relied upon the representations and promises made to him, and because he was giving to the plaintiff in error every opportunity to make good its promises. We do not believe that good conscience or good morals or good law will permit this defendant in error to be required to pay \$3600.00 with interest and counsel fees for a worthless engine which did not meet his requirements merely because he listened to the promises and representations of the plaintiff in error

that it would make the machine adequate, and relied upon them.

For the reasons stated herein we thoroughly believe that the judgment of the trial court should be affirmed.

(All italics ours).

WILLIAM COLLIER,
HUGH H. CRAIG,
Attorneys for Defendants in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

STEWART MINING COMPANY, a Corporation,
Appellant,

vs.

BUNKER HILL AND SULLIVAN MINING
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Transcript of Record.

Upon Appeal from the United States District Court
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Names and Addresses of Attorneys.

CULLEN, LEE & MATTHEWS, Spokane, Washington,

GUNN, RASCH & HALL, Helena, Montana,
Solicitors for Appellant.

CURTIS H. LINDLEY, San Francisco, Cal.,

MYRON A. FOLSOM, Spokane, Washington,
Solicitors for Respondent.

*In the District Court of the United States, District
of Idaho, Northern Division.*

STEWART MINING COMPANY, a Corporation,
Complainant,

vs.

BUNKER HILL AND SULLIVAN MINING &
CONCENTRATING COMPANY, a Corpora-
tion,
Defendant.

Bill of Complaint.

To the Honorable, the Judge of the District Court of
the United States, District of Idaho, Northern
Division:

The Stewart Mining Company, a corporation created and existing under and by virtue of the laws of the State of Washington, brings this, its bill of complaint, against the defendant, the Bunker Hill and Sullivan Mining & Concentrating Company, a resident and citizen of the State of Oregon, and thereupon your orator complains and alleges:

I.

That your orator is now and at all times since the year 1902 has been a corporation duly organized and existing under and by virtue of the laws of the State of Idaho and a resident and citizen of such State and empowered to own, possess and enjoy the mining claim and property hereinafter described.

II.

That the defendant, the Bunker Hill and Sullivan Mining & Concentrating Company, is a corporation organized and [1*] existing under and by virtue of the laws of the State of Oregon and a resident and citizen of such State.

III.

That your orator is now, and for a long time hitherto has been, the owner in fee, in possession of, and entitled to the possession of, that certain quartz lode mining claim situated in Yreka Mining District, Shoshone County, Idaho, known and designated as the Senator Stewart Fraction lode mining claim, and of all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of the surface lines of said mining claim extended down and vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of the said claim, which said mining claim is particularly described in the United States patent issued therefor as follows:

BEGINNING at corner No. 1, from which
corner common to Sections one (1), two (2),

*Page number appearing at foot of page of original certified Record.

eleven (11), and twelve (12), of Township forty-eight (48) North, Range two (2) East, B. M., bears north eight-six (86) degrees, eleven (11) minutes thirty (30) seconds west, three hundred twenty and thirty-eight hundredths (320.38) feet; thence south twenty-four (24) degrees, thirty-eight (38) minutes west, six hundred (600) feet to corner No. 2; thence north sixty-three (63) degrees, fifty-five (55) minutes west, thirteen hundred eighty-five and four-tenths (1385.4) feet to corner No. 3; thence north twenty-four (24) degrees, thirty-eight (38) minutes east, five hundred (500) feet to corner No. 4; thence south sixty-eight (68) degrees three (3) minutes east, thirteen hundred eighty-six and forty-seven hundredths (1386.47) feet to place of beginning, containing an area of sixteen and one hundred and ninety-six thousandths (16.196) acres, more or less.

That within said Senator Stewart Fraction quartz lode mining claim is a certain vein or lode bearing silver, lead and other valuable minerals, the top or apex of which vein or lode crosses the easterly end line of said claim at approximately the center thereof between corners Nos. 1 and [2] 2 and extends within the boundaries of said claim in a westerly direction, following the general course of said claim, for a distance of seven hundred five (705) feet, more or less.

That said vein or lode has a downward course and descends into the earth southerly and beyond the south boundary and side line of said claim into and

beneath the surface of the Silver Casket, Survey No. 790, Saxon, Survey No. 2067, Sierra Nevada, Survey No. 554, Carbonate, Survey No. 764, Marion, Survey No. 583, and Ace, Survey No. 2583, mining claims and a southerly triangular portion of the Lazy Jean quartz lode mining claim, Survey No. 1858, owned by the defendant mining company, being patented mining claims.

IV.

Your orator further avers that for many years last past your orator has been and is now the owner in fee, in the possession of, and entitled to the possession of said vein or lode, the top or apex of which is within said Senator Stewart Fraction quartz lode mining claim, as aforesaid, between a vertical plane drawn downward through the east end line of said claim extended southerly in its own direction indefinitely, and a vertical plane drawn downward through a line seven hundred five (705) feet westerly from said east end line and parallel thereto extended as aforesaid.

V.

Your orator further avers that said defendant is the owner, or claims to be the owner, of the said Silver Casket, Survey No. 790, Saxon, Survey No. 2067, Sierra Nevada, Survey No. 554, Carbonate, Survey No. 764, Marion, Survey No. [3] 583, and Ace Survey No. 583 mining claims and a southerly triangular portion of the Lazy Jean quartz lode mining claim, Survey No. 1858, situated in the Yreka Mining District, Shoshone County, Idaho, and lying in a group about four hundred (400) feet southerly

from said Senator Stewart Fraction quartz lode mining claim, and claims an estate or interest adverse to complainant in and to that part of said vein or lode having its apex within the boundaries of the Senator Stewart Fraction quartz lode mining claim as aforesaid beneath the said Silver Casket, Saxon, Sierra Nevada, Carbonate, Marion and Ace, and the southerly triangular portion of the Lazy Jean mining claims, which part is between the planes extended as aforesaid.

VI.

Your orator further avers that the said defendant, Bunker Hill and Sullivan Mining & Concentrating Company, has driven a long tunnel from the surface from one of its said claims into and towards the said vein, which apexes within the said Senator Stewart Fraction quartz lode mining claim, for the purpose of intersecting the said vein, and threatens to and is about to enter in and upon the said vein for the purpose of extracting ore therefrom.

VII.

Your orator further avers that the claim of the said defendant is false and groundless, and without any right whatsoever, and constitutes a cloud upon your orator's title thereto, and that the said defendant has no right, title, estate or interest whatever in or to said vein or lode, or any part thereof. [4]

VIII.

Your orator further avers that that portion of said vein or lode to which said defendant wrongfully asserts title and claim, as herein alleged, exceeds in value the sum of one hundred thousand (\$100,000.00)

dollars, exclusive of interests and costs.

IX.

That your orator has no plain, speedy or adequate remedy in the ordinary course of law.

IN CONSIDERATION WHEREOF, and foreasmuch as your orator is entirely remediless in the premises at and according to the strict rules of the common law, and can secure relief only in a court of equity where matters of this nature are properly cognizable and reviewable, and to the end that the said defendant may appear and answer to all and singular the matters in this bill of complaint, but not under oath, an answer under oath being hereby expressly waived, your orator prays that said defendant may be made to set forth the nature of his claim, and that all adverse claims of said defendant may be determined by the decree of this Court, and that by said decree it be declared and adjudged that said defendant has not any estate or interest whatsoever in or to said vein or lode, or any portion thereof, between the planes above described, and that by said decree it be declared and adjudged that the title of your orator thereto is good and valid, and that said defendant be enjoined and forever restrained from asserting any claim whatsoever in or to said vein or lode between said planes.

May it please your Honor to grant unto your orator a writ of subpoena of the United States of America, directed [5] to said defendant, commanding it to appear on a date certain and answer unto this bill of complaint, and to abide by and perform the

order and decree of this Court.

STEWART MINING COMPANY.

By E. H. WILSON,

Vice-president.

GUNN, RASCH & HALL,

HAPPY, CULLEN, LEE & HINDMAN,

Solicitors for Complainant. [6]

State of Washington,

County of Spokane,—ss.

E. H. Wilson, being first duly sworn, deposes and says, that he is an officer of the complainant above named, to wit, its vice-president, and that he is entitled and authorized by the said company to make this affidavit in its behalf; that he has read the above and foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated upon information and belief, and as to those matters that he believes them to be true.

E. H. WILSON.

Subscribed and sworn to before me this 3d day of October, 1912.

[Notarial Seal]

W. E. CULLEN, Jr.,

Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

[Endorsed]: Filed October 3, 1912. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk. [7]

*In the District Court of the United States for the
Northern Division of the District of Idaho.*

IN EQUITY—No. 557.

STEWART MINING COMPANY, a Corporation,
Complainant,

vs.

BUNKER HILL AND SULLIVAN MINING &
CONCENTRATING COMPANY, a Corpora-
tion,

Defendant.

Subpoena ad Respondendum.

The President of the United States of America, to
Bunker Hill and Sullivan Mining & Concentrat-
ing Company, a Corporation, Greeting:

You and each of you are hereby commanded that
you be and appear in said District Court of the
United States, at the courtroom thereof, in Coeur
d'Alene, in said District, on the first Monday of No-
vember next, which will be the 4th day of Novem-
ber, A. D. 1912, to answer the exigency of a Bill of
Complaint exhibited and filed against you in our
said court, wherein Stewart Mining Company, a
corporation, is complainant and you are defendant,
and further to do and receive what our said Circuit
Court shall consider in this behalf and this you are
in no wise to omit under the pains and penalties of
what may befall thereon.

And this is to COMMAND you the MARSHAL
of said District, or your DEPUTY, to make due ser-

vice of this our WRIT of SUBPOENA and to have then and there the same.

Hereof not fail.

Witness the Honorable FRANK S. DIETRICH, Judge of the District Court of the United States, and the Seal of our said Court affixed at Boise in said District, this 9th day of October, in the year of our Lord One Thousand Nine Hundred and Twelve and of the Independence of the United States the One Hundred and Thirty-seventh.

[Seal]

A. L. RICHARDSON,

Clerk.

MEMORANDUM PURSUANT TO EQUITY
RULE NO. 12 OF THE SUPREME COURT
OF THE UNITED STATES.

The defendant is to enter his appearance in the above-entitled suit in the office of the Clerk of said Court on or before the day at which the above Writ is returnable; otherwise the Complainant's Bill therein may be taken *pro confesso*.

This is to certify that I received the within *Subpoena ad Respondendum*, together with a certified copy of the complaint at Lewiston, Idaho, on the 12th day of October, 1912, and that I served the same on the Bunker Hill and Sullivan Mining & Concentrating Company, a corporation, at Kellogg, Shoshone County, Idaho, on the 15th day of October, 1912, by handing to and leaving with Stanley A. Easton, Statutory Agent of the Bunker Hill and Sullivan Mining & Concentrating Company, a corporation, a duplicate of the within *Subpoena Ad Re-*

spondendum, together with the certified copy of the complaint.

S. L. HODGIN,

U. S. Marshal.

By Wm. Schuldt,

Deputy.

Dated October 17th, 1912.

[Endorsed]: No. 557. In the District Court of the United States for the Northern Division of the District of Idaho. In Equity. Stewart Mining Co. vs. Bunker Hill & Sullivan M. & C. Co. *Subpoena Ad Respondendum*. Returned and filed Nov. 5, 1912. A. L. Richardson, Clerk.

H. Civ. 532 10/9/12. [8]

In the District Court of the United States for the District of Idaho, Northern Division.

Number 557.

STEWART MINING COMPANY, a Corporation,

Complainant,

vs.

BUNKER HILL AND SULLIVAN MINING &
CONCENTRATING COMPANY, a Corporation,
Defendant.

Appearance [of Defendant].

To the Clerk of the District Court of Idaho:

Please enter the appearance of the Bunker Hill and Sullivan Mining and Concentrating Company, the defendant in the above cause, and of myself as solicitor and counsel, as of November 4th, 1912.

MYRON A. FOLSOM,

Solicitor and Counsel.

[Endorsed]: Filed Nov. 4, 1912. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk.
[9]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

Number 557.

STEWART MINING COMPANY, a Corporation,
Complainant,

vs.

BUNKER HILL AND SULLIVAN MINING &
CONCENTRATING COMPANY, a Corpora-
tion,

Defendant.

Answer.

The defendant answers the bill of complaint as follows:

I.

Defendant admits the allegations in paragraph one and two of the bill of complaint.

II.

Defendant admits that plaintiff is the owner in possession and entitled to the possession of that certain lode claim known as the Senator Stewart Fraction quartz lode mining claim. Defendant denies that the said claim is described in the United States patent as set forth in the complaint. Defendant admits that the description set forth on page three of the said complaint correctly described the lines bounding said claim as the same are described in the patent. But defendant alleges that said patent in

addition to the description contained in paragraph three of the complaint contains the following language:

“Expressly excepting and excluding from these presents all that portion of the ground hereinbefore described embraced in said Royal Knight Lode Mining Claim, Survey Number 1639 A. M., and that portion of said survey number 1314 A. M. in conflict with said Senator Stewart Fraction Lode Mining Claim; and also all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground.” [10]

Defendant denies that plaintiff is the owner of all veins, lodes, and ledges throughout their entire depth, the tops or apexes of which lie inside of the surface lines of said Senator Stewart Fraction lode mining claim. Defendant admits that within said Senator Stewart Fraction lode mining claim there is a certain vein or lode bearing silver, lead and other valuable minerals; but defendant denies that the top or apex of said vein or lode crosses the easterly end line of said claim at approximately the center thereof between corners number one and two; or that the said top or apex crosses the said end line at any other place; and defendant denies that the said top or apex extends within the boundaries of said claim in a westerly direction following the general course of said claim for a distance of seven hundred and five feet; or for any distance. Defendant alleges that the course of said apex of said vein is substantially parallel with

the end lines of said claim, and lies within a distance of about four hundred and fifty feet of the westerly end line; and if not cut off by faults on the northerly and southerly ends, would cross the said side lines of said claim.

Defendant admits that the said vein or lode has a downward course, and descends into the earth in an easterly direction and passes underneath the easterly end line of said claim; but defendant denies that the said vein has a downward course or descends into the earth southerly; or that it passes beyond the south boundary or side line of said claim into or beneath the surface of the Silver Casket and other mining claims or ground described in paragraph three of the complaint. Defendant also denies that it is the owner or claims to be the owner of the Sierra Nevada, or Carbonate lode mining claims. [11]

III.

Defendant denies that *complaint* has been for many years or now is the owner in fee in possession of and entitled to the possession of any portion of said vein having its top or apex in the Senator Stewart Fraction lode mining claim lying between a vertical plane drawn downward through the east end line of the Senator Stewart Fraction lode mining claim extended southerly in its own direction indefinitely, and a vertical plane drawn downward through a line seven hundred and five feet westerly from said east end line and parallel thereto extended as aforesaid. Defendant denies that the plaintiff is the owner of any portion of said vein lying southerly of the south side line of said claim.

IV.

Defendant admits that it is the owner of the Silver Casket, Saxon, Marion and Ace lode mining claims, and is the owner of a portion of the Lazy Jean lode mining claim, Survey Number 1858, lying southerly from said Senator Stewart Fraction quartz lode mining claim; and admits that it claims to be and is the owner of all ores and minerals beneath the surface of, or which may be a part of said lode mining claims by virtue of its ownership of the said Silver Casket, Saxon, Marion and Ace lode mining claims, and by virtue of a conveyance from the complainant to the predecessor in interest of this defendant of the triangular portion of said Lazy Jean quartz lode mining claim, which lies within the exterior boundaries of said Saxon lode mining claim; said conveyance having transferred to the defendant all ores and minerals beneath the surface of that portion of the Lazy Jean lode mining claim above referred to.

Defendant denies that it is the owner or claims to be the owner of the Sierra Nevada or Carbonate lode mining claims, or of any veins, ores, or minerals beneath the surface of said [12] mining claims. Defendant alleges that for many years last past the said Sierra Nevada and Carbonate lode mining claims, together with all veins, lodes, ledges, and minerals contained therein, or a part thereof, have and now are owned and possessed by the Sierra Nevada Consolidated Mining Company, a corporation organized under the laws of Oregon.

V.

Defendant admits that it has driven a tunnel for

the purpose of intersecting ore bodies and veins beneath the said Silver Casket, Saxon, Marion and Ace lode mining claims, the property of said defendant, and if any ore or mineral of commercial value is encountered by said tunnel, the said defendant will extract and remove the same, as it has a right to do by virtue of its ownership of the said mining claims.

VI.

Defendant denies that its claim of ownership to the said claims is false or groundless, or without any right; or that it constitutes a cloud upon complainant's title. Defendant alleges that it is the owner in possession and entitled to the possession of the said Silver Casket, Saxon, Marion and Ace lode mining claims described in the complaint; and of the triangular portion of said Lazy Jean lode mining claim above referred to; and of all veins, lodes, ledges, and minerals beneath the surface of or which constitute a part of said lode mining claims.

VII.

Defendant admits that said ores and veins which constitute a part of said lode mining claim, and which lie beneath the surface thereof, is of the value of One Hundred Thousand (\$100,000) Dollars, exclusive of interest and costs; but defendant denies that it wrongfully asserts title or claim to said ore bodies.

[13]

WHEREFORE, defendant prays that complainant take nothing by its bill; that the same be dis-

missed; and that defendant be awarded its costs.

BUNKER HILL & SULLIVAN MINING
& CONCENTRATING COMPANY,

By MYRON A. FOLSOM.

CURTIS H. LINDLEY,

MYRON A. FOLSOM,

Solicitors and Counsel for Said Defendant.

[Endorsed]: Filed December 4, 1912. A. L. Richardson, Clerk. [14]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

STEWART MINING COMPANY, a Corporation,
Complainant,

vs.

BUNKER HILL AND SULLIVAN MINING
AND CONCENTRATING COMPANY, a
Corporation,

Defendant.

Replication.

The Replication of the Stewart Mining Company, complainant, to the Answer of the defendant, Bunker Hill and Sullivan Mining and Concentrating Company.

This replication saving and reserving unto itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain and prove its said bill of complaint to

be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this replicant. Without this that any other matter or things whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied is true. All which matters and things this replicant is and will be ready to aver, maintain [15] and prove as this Honorable Court shall direct, and humbly prays as in and by its bill it has already prayed.

GUNN, RASCH & HALL,
HAPPY, CULLEN, LEE & HINDMAN,
FEATHERSTONE & FOX,

Solicitors for Complainant.

[Endorsed]: Filed Dec. 30, 1912. A. L. Richardson, Clerk. [16]

*In the District Court of the United States, District
of Idaho, Northern Division.*

STEWART MINING COMPANY,

Complainant,

vs.

BUNKER HILL & SULLIVAN MINING AND
CONCENTRATING COMPANY,

Defendant.

STEWART MINING COMPANY,

Complainant,

vs.

JONATHAN BOURNE, Junior, and LILLIAN E.
BOURNE,

Defendants.

STEWART MINING COMPANY,

Complainant,

vs.

SIERRA NEVADA CONSOLIDATED MINING
COMPANY,

Defendant.

Stipulation Consolidating Causes.STIPULATION CONSOLIDATING ABOVE
CAUSES AND PROVIDING FOR USE OF
TESTIMONY HERETOFORE TAKEN.

WHEREAS, the Stewart Mining Company, complainant in each of the above-entitled causes, is asserting title to certain portions of a mineral vein or lode lying outside of the exterior boundaries of the Stewart Fraction lode mining claim, and is basing its claim of title upon the allegation that the vein in question has its apex within said Stewart Fraction lode mining claim, and

WHEREAS, in each of the above-entitled causes the allegations of the complaint are identical so far as the foundation of [17] plaintiff's title is concerned, and

WHEREAS, the defendant in the several causes above mentioned are very similar, and

WHEREAS, in a cause which was commenced by the Stewart Mining Company against the Ontario Mining Company, Stanley A. Easton and Myron A. Folsom, in the District Court of the First Judicial District of the State of Idaho for Shoshone County, the issues are very similar to those involved in the above-entitled causes, and

WHEREAS, in said cause a large amount of testimony was taken and a large number of exhibits were introduced, all of which testimony and exhibits would be as pertinent to the issues in the above-entitled causes as in the case in which the same were offered.

NOW, THEREFORE, for the purpose of saving the time of the courts and of the parties herein, and for the purpose of saving expense, it is hereby stipulated as follows:

I.

The three causes above entitled are hereby consolidated for the purpose of trial, appeal and other proceedings in said cause.

II.

It is further stipulated that a copy of the testimony taken and the exhibits or copies and duplicates thereof, offered in the case which was commenced in the State District Court for the First Judicial District, Shoshone County, above referred to, may be filed in either one of the above-entitled causes with the same force and effect as if the witnesses had been sworn, examined and cross-examined, and the exhibits offered and received in the above-entitled court and causes, and when so filed shall constitute a part of the record in each of said causes.

III.

It is further stipulated that either party to the above-entitled [18] causes may offer additional testimony upon any subject not covered by the testimony to be filed as aforesaid, but no more than three witnesses shall be called by either side.

Dated this 12th day of May, 1913.

M. S. GUNN,

CULLEN, LEE & HINDMAN,

Attorneys for Stewart Mining Company, Plaintiff.

CURTIS H. LINDLEY,

MYRON A. FOLSOM,

Attorneys for Defendant, Bunker Hill Mining & Concentrating Company.

CURTIS H. LINDLEY,

MYRON A. FOLSOM,

Attorneys for Defendant, Sierra Nevada Consolidated Mining Company.

MYRON A. FOLSOM,

Attorney for Defendant, Jonathan Bourne, Junior.

The above stipulation is approved, and an order may be entered in each of the above-entitled causes accordingly.

District Court Judge.

[Endorsed]: Filed May 26, 1913. A. L. Richardson, Clerk. [19]

At a stated term of the United States District Court for the District of Idaho, Northern Division, held at Coeur d'Alene, Idaho, on Monday, the 26th day of May, 1913. Present: Hon. FRANK S. DIETRICH, Judge.

No. 557.

STEWART MINING COMPANY

vs.

BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY.

Order Consolidating Causes.

In accordance with stipulation on file in each cause, it is ordered that this cause and No. 558, Stewart Mining Company vs. Jonathan Bourne, Junior, and Lillien E. Bourne, and No. 563, Stewart Mining Company vs. Sierra Nevada Consolidated Mining Company, be consolidated for the purposes of trial, appeal and other proceedings in said cause. [20]

In the District Court of the United States, District of Idaho, Northern Division.

STEWART MINING COMPANY,

Complainant,

vs.

BUNKER HILL & SULLIVAN MINING AND
CONCENTRATING COMPANY,

Defendant.

STEWART MINING COMPANY,

Complainant,

vs.

JONATHAN BOURNE, Junior, and LILLIAN E.
BOURNE,

Defendants.

STEWART MINING COMPANY,

Complainant,

vs.

SIERRA NEVADA CONSOLIDATED MINING
COMPANY,

Defendant.

Stipulation of Facts.

WHEREAS, on the 12th day of May, 1913, the parties above named entered into a stipulation consolidating the three cases above named, and providing that the testimony, maps and exhibits, or copies and duplicates thereof, offered in a case commenced in the District Court of the First Judicial District of the State of Idaho, Shoshone County, wherein the Stewart [21] Mining Company was plaintiff and the Ontario Mining Company and others were defendants, might be filed in the above-entitled causes, and

WHEREAS, it was further provided in said stipulation that either party in the above-entitled causes might offer additional testimony upon any subject not covered by the testimony to be filed as aforesaid, but that no more than three witnesses might be called on either side, and,

WHEREAS, the parties to the causes above

named now desire to avoid taking the testimony last above referred to, and to agree upon such facts as are not covered by the testimony above referred to, and to close the testimony in said cases,

NOW, THEREFORE, all the parties named on the first page of this stipulation hereby agree that the following facts are true and may be treated as admitted facts in each of the above-named causes.

1. That the Stewart Mining Company is now, and was at the time of the commencement of the suits above named, the owner of the Stewart Fraction lode mining claim for which it holds patent from the United States: The Bunker Hill & Sullivan Mining and Concentrating Company is the owner of the Silver Casket mining claim, Survey No. 790, the Saxon lode mining claim, Survey No. 2067, the Marion lode mining claim, Survey No. 2583, and the Ace lode mining claim, Survey No. 2583, and the southerly triangular portion of the Lazy Jean quartz mining claim, Survey No. 1858, all of said claims being patented mineral claims; that the Silver Casket lode claim adjoins the Senator Stewart lode claim on the south, its side lines having a northwesterly and southeasterly course and its end line a northeasterly and southwesterly course; the Saxon lode claim has a length of 1445.3 feet and a width of 603.6 feet, and the northwest corner of said claim is upon the Senator Stewart lode claim, [22] the southwest corner is upon the Silver Casket lode claim, the southeast corner is southeasterly from the southeast corner of the Ontario lode claim, and its northeast corner is upon the Switchback claim; the free ground within

said claim consists of an irregularly shaped fraction west of the Ontario lode claim and south of the Senator Stewart lode claim and another irregularly shaped fraction south of the Ontario lode claim, and another irregularly shaped fraction east of the Ontario and Ontario Fraction lode claims; the Marion and Ace lode claims embrace fractions south of the southeast corner of the Silver Casket lode claim.

2. The Ontario lode mining claim is owned by Jonathan Bourne, Junior, is a patented lode mining claim, and is the same claim which was frequently referred to in the testimony which will be filed in the above-entitled causes in pursuance of the stipulation above referred to.

3. The Sierra Nevada and Carbonate lode mining claims lie a short distance south of the Ontario lode mining claim, but neither of said claims adjoins the Ontario. The Sierra Nevada and Carbonate claims are owned by the Sierra Nevada Consolidated Mining Company, and have been patented for more than twenty years.

4. On August 31st, 1904, the Stewart Mining Company conveyed to the Federal Mining and Smelting Company, and the latter company, in May, 1910, conveyed to the Bunker Hill & Sullivan Mining & Concentrating Company, a triangular portion of the Lazy Jean lode mining claim, which portion lies west of the Ontario lode mining claim and is described as follows:

“Beginning at Corner No. 5 Lazy Jean Lode Claim, Survey No. 1858, thence North $24^{\circ} 38'$ East 305 feet to the side line of the Saxon Lode Claim, thence south 64° East 122.5 feet to line

4-5 Lazy Jean Lode Survey No. 1858, thence south $50^{\circ} 33'$ West 380.3 feet to place of beginning." [23]

5. That the deed from the Stewart Mining Company to the Federal Mining and Smelting Company conveying said triangular portion of the Lazy Jean lode as aforesaid, after describing the said ground as aforesaid, contained the following language:

"Together with all dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also, all and singular, the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title and interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the said premises, and every part and parcel thereof, with the appurtenances."

A copy of said deed is attached hereto, marked Exhibit "A" and made a part hereof.

6. That the deed from the Federal Mining and Smelting Company to the Bunker Hill & Sullivan Mining and Concentrating Company above referred to conveyed all of its rights and property in and to the said Lazy Jean lode.

7. It is further stipulated and agreed that the

vein which was the subject of controversy in the case of the Stewart Mining Company against the Ontario Mining Company passes beneath the triangular portion of the Lazy Jean lode claim, the Saxon, the Marion, Ace, Silver Casket, Ontario, Sierra Nevada and Carbonate lode mining claims, and the boundaries and position of said claims are correctly shown upon the maps filed herein.

8. The Silver Casket mining claim was located in the year 1885; the Ontario in 1885; the Sierra Nevada and Carbonate in 1886; the Stewart Fraction in 1889; the Saxon in 1899; the Marion and Ace in 1909.

9. It is further stipulated that the foregoing facts together with the testimony and exhibits to be filed herein in pursuance of the stipulation of the parties made on May 12th, 1913, shall constitute the entire evidence to be used in each [24] of the above-entitled causes; and each of the above cases shall be deemed closed and ready for argument upon the filing of the stipulation, and a copy of the testimony and such of the exhibits or copies or duplicates thereof as either party may deem material, and no witnesses shall be called by either side.

Dated this 24th day of November, 1913.

GUNN, RASCH & HALL,

CULLEN, LEE & MATTHEWS,

Counsel and Solicitors for Stewart Mining Company.

CURTIS H. LINDLEY and

MYRON A. FOLSOM,

Counsel and Solicitors for Bunker Hill and Sullivan
Mining and Concentrating Company.

CURTIS H. LINDLEY and
MYRON A. FOLSOM,

Counsel and Solicitors for Sierra Nevada Consolidated Mining Company.

MYRON A. FOLSOM,

Counsel and Solicitor for Jonathan Bourne, Jr., and
Lillian E. Bourne. [25]

EXHIBIT "A."

DEED TO MINING CLAIM.

THIS INDENTURE, made this 31st day of August, A. D. 1904, between Stewart Mining Company, a corporation, party of the first part, and Federal Mining and Smelting Company, a corporation, party of the second part:

WITNESSETH: That the said party of the first part, for and in consideration of the sum of One (\$1.00) Dollar lawful money of the United States of America, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and forever quitclaimed and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto said party of the second part, and to its heirs and assigns all of the following described real estate situated in Yreka Mining District, Shoshone County, Idaho, to wit:

All that part of the Lazy Jean Lode Mining Claim, Survey No. 1858, in conflict with the Saxon Lode Mining Claim, the property of the party of the second part, the portion of the said Lazy Jean Lode by this instrument transferred,

being more particularly described as follows, to-wit: Beginning at Corner No. 5 Lazy Jane Lode Claim, Survey No. 1858; Thence N. $24^{\circ} 38'$ E. 355 feet to the N. side line of 'Saxon Lode: Thence S. 64° E. 122.5 feet to line 4-5 Lazy Jane Lode, Survey No. 1858; Thence S. $50^{\circ} 33'$ W. 280.3 feet to the place of beginning. Containing 358 acres, more or less.

Together with all dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also, all and singular, the tenements, hereditaments and appurtenances thereto belonging or in any-wise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party [26] *party* of the first part, of, in and to the said premises and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, its successors and assigns forever.

IN WITNESS WHEREOF, the said corporation has its president to sign its name and affix his name as president and has caused the secretary to attest

the same and attach the corporate seal of the corporation hereto.

[Corporate Seal]

STEWART MINING COMPANY,

By H. F. SAMUELS, [Seal]

President.

W. N. MORPHY, [Seal]

Secretary.

Duly acknowledged by H. F. Samuels as president.

[Endorsed]: Filed Nov. 24, 1913. A. L. Richardson, Clerk. [27]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

CONSOLIDATED CASES.

STEWART MINING COMPANY,

Complainant,

vs.

BUNKER HILL & SULLIVAN MINING & CON-
CENTRATING COMPANY et al.,

Defendants.

**Stipulation [Relative to Defendants' Model Exhibit
"L" and Defendants' Map Exhibit "B," etc.].**

It is hereby stipulated that the model of the defendants designated as Defendants' Exhibit "L" is a duplicate of the model introduced in evidence in the case of the Stewart Mining Company vs. The Ontario Mining Company et al., referred to in the stipulations heretofore entered into, with the exception that the stopes were not shown on said model

introduced in evidence in the State court, and it is further stipulated that the stopes as shown upon said model in the present cases were placed on the said model for illustrative purposes, and the data therefor was taken from the stope map of complainant and there is no testimony in the record verifying the correctness of said stopes as shown upon said model.

It is further stipulated that the stopes shown upon defendants' map Exhibit "B" were not shown upon the map introduced in evidence in the State court, and that there is no testimony in the record verifying the correctness of said map with reference to said stopes; that said stopes were placed upon said map for illustrative purposes, and are to be so considered.

It is further stipulated that the development in the [28] Switch Back and Ontario claims to which no reference is made in the testimony, was not shown on the said map introduced in evidence in the State court.

Dated December 15, 1913.

CULLEN & LEE and

GUNN, RASCH & HALL,

Attorneys for Complainant.

CURTIS H. LINDLEY and

MYRON A. FOLSOM,

Attorneys for Defendants.

[Endorsed]: Filed December 15, 1913. A. L. Richardson, Clerk. [29]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

No. 557.

STEWART MINING COMPANY,

Plaintiff,

vs.

BUNKER HILL & SULLIVAN MINING & CON-
CENTRATING COMPANY,

Defendant.

Decision.

Jan. 16, 1914.

GUNN, RASCH & HALL, HAPPY, CULLEN,
LEE & HINDMAN, CULLEN, LEE & MAT-
THEWS, and FEATHERSTONE & FOX,
Counsel and Solicitors for Plaintiff.

CURTIS H. LINDLEY and MYRON A. FOLSOM,
Counsel and Solicitors for Defendant.

DIETRICH, District Judge:

For the reasons stated in the opinion this day filed
in No. 558, Stewart Mining Company vs. Jonathan
Bourne, Jr., et ux. the complaint herein will be dis-
missed.

[Endorsed]: Filed January 16, 1914. A. L.
Richardson, Clerk. [30]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

No. 557.

STEWART MINING COMPANY, a Corporation,
Complainant,

vs.

BUNKER HILL & SULLIVAN MINING & CON-
CENTRATING COMPANY, a Corporation,
Defendant.

Judgment.

This cause came on for final hearing before the Court, and the Court upon due consideration of the bill, the answer, the replication, the evidence and the arguments of counsel, doth now,

ORDER, ADJUDGE AND DECREE that this suit be, and the same is hereby dismissed, with costs to the defendant to be taxed.

Dated this 31st day of January, 1914.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed January 31, 1914. A. L.
Richardson, Clerk. [31]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

BUNKER HILL & SULLIVAN MINING & CON-
CENTRATING COMPANY, a Corporation,
Defendant.

Assignment of Error.

Now comes the Stewart Mining Company, plaintiff in the above-entitled cause, and says that the United States District Court for the District of Idaho, erred in its decision and decree in said cause, as appears from the record therein and that the errors committed are as follows, to wit:

1. The said Court erred in holding and deciding that the edge or termination of the vein along the Osborn fault beneath the surface of the Senator Stewart Fraction claim is not a top or apex within the meaning of those terms as used in section 2322 of the Revised Statutes of the United States.

2. The said Court erred in holding and deciding that the top or apex of said vein is not so situated with reference to the Senator Stewart Fraction claim as to entitle plaintiff to an extralateral right to those sections of the vein beneath the Silver Casket, Saxon, Marion and Ace lode mining claims, and the triangular portion of the Lazy Jean lode mining claim, [32] described in the complaint, between the vertical

planes of the end lines of the Senator Stewart Fraction claim extended.

3. The said Court erred in holding and deciding that the course pursued in following on the vein from the edge or termination thereof along said Osborn fault beneath the surface of the Senator Stewart Fraction claim along vertical planes parallel with the vertical plane of the end line of said claim extended to the parts of the vein beneath the Silver Casket, Saxon, Marion and Ace lode mining claims, and the triangular portion of the Lazy Jean lode mining claim, described in the complaint, is not a downward course within the meaning of the words "downward course" and "course downward" as the same appear in section 2322 of the Revised Statutes of the United States.

4. The Court erred in holding and deciding that the question whether the termination or edge of the vein along the Osborn fault is a top or apex thereof should be determined without reference to the situation of the Senator Stewart Fraction claim, or the boundary lines thereof.

5. The said Court erred in holding and deciding that the plaintiff has no extralateral right to those sections of the vein beneath the surface of the Silver Casket, Saxon, Marion and Ace lode mining claims, and the triangular portion of the Lazy Jean lode mining claim, described in the complaint, within the vertical planes of the end lines of the Senator Stewart Fraction claim extended.

6. The said Court erred in holding and deciding that the plaintiff is not the owner of those sections

of the vein beneath the Silver Casket, Saxon, Marion and Ace lode mining claims, and the triangular portion of the Lazy Jean lode mining claim, described in the complaint, between the vertical [33] planes of the end lines of the Senator Stewart Fraction claim extended.

7. The said Court erred in holding and deciding that the plaintiff conveyed that section of the vein beneath the said triangular portion of the Lazy Jean claim by the deed to the Federal Mining and Smelting Company.

8. The said Court erred in rendering a decree dismissing the bill of complaint in said cause.

WHEREFORE, the plaintiff, the Stewart Mining Company, prays that for the errors aforesaid and other errors appearing in the said cause to its prejudice that the said decree may be reversed.

GUNN, RASCH & HALL,

CULLEN, LEE & MATTHEWS,

Solicitors for Plaintiff Stewart Mining Company.

Due service acknowledged this 17th day of March, 1914.

C. H. LINDLEY,

M. A. FOLSOM,

Attys. for Defts.

[Endorsed]: Filed March 19, 1914. A. L. Richardson, Clerk. [34]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

BUNKER HILL AND SULLIVAN MINING AND
CONCENTRATING COMPANY, a Corpora-
tion,
Defendant.

Petition for Order Allowing Appeal.

Comes now the above-named plaintiff, the Stewart Mining Company, and conceiving itself to be aggrieved by the decree made, rendered and entered in the above-entitled cause, on the 31st day of January, 1914, wherein and whereby it was ordered, adjudged and decreed that the bill of complaint therein be dismissed, hereby petitions for the allowance of an appeal from said decree to the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the said plaintiff should give and furnish upon said appeal.

And your petitioner will forever pray, etc.

GUNN, RASCH & HALL

CULLEN, LEE & MATTHEWS,

Solicitors for Plaintiff Stewart Mining Company.

Due service acknowledged this 17th day of March,
1914.

M. A. FOLSOM,

C. H. LINDLEY,

Attys. for Defts.

[Endorsed]: Filed March 19, 1914. A. L. Richardson, Clerk. [35]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

BUNKER HILL AND SULLIVAN MINING AND
CONCENTRATING COMPANY, a Corpora-
tion,
Defendant.

Order Allowing Appeal, etc.

The petition of the Stewart Mining Company, plaintiff in the above-entitled cause, for an order allowing an appeal from the decree rendered and entered in said cause, on the 31st day of January, 1914, together with assignments of error, having been filed herein:

IT IS ORDERED that an appeal be and the same is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the decree made and entered in said cause; and that the amount of bond upon said appeal be and the same is hereby fixed at the sum of \$500.00; and that a certified transcript of the records and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

Dated this 19th day of March, 1914.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed March 19, 1914. A. L. Richardson, Clerk. [36]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

BUNKER HILL AND SULLIVAN MINING AND
CONCENTRATING COMPANY, a Corpora-
tion,
Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Stewart Mining Company, as principal,
and United States Fidelity & Guaranty Co. as surety,
are held and firmly bound unto Bunker Hill and
Sullivan Mining and Concentrating Company in the
full and just sum of \$500.00, to be paid to the said
Bunker Hill and Sullivan Mining and Concentrating
Company, its successors and assigns, for which pay-
ment well and truly to be made we bind ourselves
and our successors and assigns, jointly and severally,
firmly by these presents.

Dated this 19th day of March, 1914.

WHEREAS, The Stewart Mining Company, plain-
tiff in the above-entitled cause, has taken an appeal
to the Circuit Court of Appeals for the Ninth Cir-
cuit to reverse the decree rendered and entered in
said cause by the above-entitled court, dismissing
the complaint therein and for costs.

NOW, THEREFORE, the condition of this obligation is such [37] that if the said Stewart Mining Company shall prosecute said appeal to effect, and answer all damage and costs, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

STEWART MINING COMPANY.

By W. E. CULLEN,

Its Attorney.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY.

[Seal]

By R. L. WEBSTER,

Its Attorney in Fact.

The foregoing bond is approved this 19th day of March, 1914.

FRANK S. DIETRICH,

United States District Judge.

[Endorsed]: Filed March 19, 1914. A. L. Richardson, Clerk. [38]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

BUNKER HILL AND SULLIVAN MINING AND
CONCENTRATING COMPANY, a Corpora-
tion,

Defendant.

Praeceptum [for Transcript of Record on Appeal].

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the entire record in said cause, omitting therefrom the testimony and evidence, and transmit the same with your certificate to the Clerk of the United States Circuit Court of Appeals at San Francisco. You will also please transmit with the record the original citation in said cause.

In your certificate please recite and certify that the testimony and exhibits in said cause are the same as in cause No. 558 in which the Stewart Mining Company, is plaintiff, and Jonathan Bourne, Jr., and Lillian E. Bourne, are defendants, said two causes and cause No. 563, in which the Stewart Mining Company, is plaintiff, and the Sierra Nevada Mining Company, is defendant, having been consolidated as per stipulation, constituting a part of the record in each of said causes and that the said testimony and exhibits have been certified and transmitted to the clerk of the Circuit Court of Appeals at San Francisco pursuant to the orders made and entered in said cause No. 558, [39] in which Jonathan Bourne, Jr., and Lillian E. Bourne, are defendants, as aforesaid.

Dated this 19th day of March, 1914.

GUNN, RASCH & HALL,

CULLEN, LEE & MATTHEWS,

Solicitors for Appellant.

[Endorsed]: Filed March 19, 1914. A. L. Richardson, Clerk. [40]

Citation [on Appeal (Original)].

UNITED STATES OF AMERICA,—ss.

To the President of the United States to Bunker Hill and Sullivan Mining and Concentrating Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within thirty days from the date of this citation, pursuant to an appeal filed in the clerk's office of the United States District Court for the District of Idaho, at Boise City, Idaho, in that certain suit numbered 557, in which Stewart Mining Company, a corporation, is plaintiff and appellant, and you are defendant and respondent, to show cause, if any there be, why the decree rendered against said Stewart Mining Company, plaintiff and appellant, as in the said order allowing the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable FRANK S. DIETRICH, United States District Judge for the District of Idaho, this 19th day of March, 1914.

FRANK S. DIETRICH,

United States District Judge for the District of Idaho.

[Seal] Attest: A. L. RICHARDSON,
Clerk of the United States District Court for the District of Idaho.

Service of the foregoing citation admitted and re-

ceipt of copy acknowledged this 21st day of March, 1914.

CURTIS H. LINDLEY,
MYRON A. FOLSOM,

A. W.

Solicitors for Defendant and Respondent. [41]

[Endorsed]: Original, No. 557. In the District Court of the United States for the District of Idaho, Northern Division. Stewart Mining Company, a Corporation, Plaintiff, vs. Bunker Hill and Sullivan Mining and Concentrating Company, a Corporation, Defendant. Citation. Filed March 23, 1914. A. L. Richardson, Clerk. [42]

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]**

*In the District Court of the United States for the
District of Idaho, Northern Division.*

STEWART MINING COMPANY, a Corporation,
Plaintiff,

vs.

BUNKER HILL AND SULLIVAN MINING
AND CONCENTRATING COMPANY, a
Corporation,

Defendant.

I, A. L. Richardson, Clerk of the above-entitled court, do hereby certify that the foregoing from page 1 to page 43, inclusive, is a complete and true transcript of the records and proceedings in the above-entitled cause, with the exception of the testimony and exhibits as appears from the papers and records in said cause on file in my office.

I further certify that the testimony and exhibits in said cause are the same as the testimony and exhibits in cause No. 558 in which the Stewart Mining Company, is plaintiff, and Jonathan Bourne, Jr., and Lillian E. Bourne, are defendants, and that said testimony and exhibits have been certified and transmitted to the clerk of the United States Circuit Court of Appeals at San Francisco, pursuant to the orders made and entered in said cause No. 558.

I further certify that there is attached to said transcript the original citation issued in the above-entitled cause.

WITNESS my hand and seal of said court this 25th day of March, 1914.

[Seal] A. L. RICHARDSON,
Clerk of the United States District Court for the
District of Idaho. [43]

[Endorsed]: No. 2389. United States Circuit Court of Appeals for the Ninth Circuit. Stewart Mining Company, a Corporation, Appellant, vs. Bunker Hill and Sullivan Mining and Concentrating Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

Received and filed March 30, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

//

United States
Circuit Court of Appeals
For the Ninth Circuit.

STEWART MINING COMPANY, a corporation,
Appellant,

vs.

SIERRA NEVADA MINING COMPANY, a corporation,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF FACTS.

This is a suit to quiet title. The plaintiff and appellant alleges ownership and possession of the Senator Stewart Fraction Quartz Lode mining claim; that within said claim is a vein, the top or apex of which extends from the easterly end line of the claim in a westerly direction through said

claim for a distance of approximately 705 feet to and across the southerly side line of the claim; and that such vein has a downward course from the apex and descends into the earth southerly beneath the Sierra Nevada and Carbonate Quartz Lode mining claims, the property of the defendant and appellee. The appellant asserts an extralateral right to the section of said vein beneath the Sierra Nevada and Carbonate claims within planes drawn downward through the end lines of the Senator Stewart Fraction claim extended. (Record p. 1.) The boundaries and situation of the claims referred to are shown on the maps in evidence in the case.

The answer (Record p. 19) denies that any vein having its apex within the Stewart Fraction claim extends beneath the Sierra Nevada and Carbonate claims. The answer also alleges an exception in the patent to the Stewart Fraction claim of that part of the claim in conflict with the Quaker Quartz Lode mining claim. The area excepted is shown by the maps in evidence and it is admitted that the exception is not material to any issue in this case.

It was stipulated that the appellant is the owner and in possession of the Steward Fraction claim and the defendant is the owner and in possession of the Serra Nevada and Carbonate claims. It was further stipulated that United States patents have issued for all of said claims and that the boundaries and situation of the claims are corerectly shown upon

the maps introduced in evidence. It was also stipulated that the vein in controversy passes beneath the Sierra Nevada and Carbonate claims. (Record pp. 26-30.)

The case was pursuant to stipulation, (Record p. 22) heard and decided by the lower court on the evidence in the case of the Stewart Mining Company vs. the Ontario Mining Company, et al., 132 Pac. 787, supplemented by an agreement as to certain facts. (Record p. 26.)

The defendant and appellee is not asserting any apex right to the section of the vein in controversy. It makes no claim to the apex of the vein, but denies the extralateral right of the appellant and relies upon the prima facie presumption of ownership of the mineral beneath the surface of the Sierra Nevada and Carbonate claims.

In view of the pleadings, stipulation and admitted facts, the only question is whether the appellant has the right of lateral pursuit of the vein beneath the Sierra Nevada and Carbonate claims.

The case was consolidated with the case of the Stewart Mining Company vs. Jonathan Bourne, Jr. and Lillian E. Bourne, his wife, "for the purpose of trial, appeal and other proceedings in said cause." (Record p. 23.) The court decided the case against appellant for the reasons stated in the opinion filed in the case of the Stewart Mining Company vs. Jonathan Bourne, Jr., et ux. (Record p. 34.)

The lower court found and decided that the easterly and westerly termination of the vein in the Stewart Fraction claim is not an apex within the meaning of the term as used in Section 2322 of the Revised Statutes of the United States, and for this reason the appellant was denied an extralateral right to the section of the vein beneath the Sierra Nevada and Carbonate claims. Because of this finding and decision the complaint was dismissed and the appeal is from the decree which was entered accordingly.

SPECIFICATIONS OF ERROR.

1. The lower court erred in finding and deciding that the easterly and westerly termination of the vein in the Stewart Fraction claim is not an apex.

2. The court erred in deciding that the appellant has no extralateral right to, and is not the owner of, the section of the vein beneath the Sierra Nevada and Carbonate claims.

* * * * *

As the extralateral right asserted by appellant is dependent upon the same facts and conditions which are made the basis of the extralateral right claimed in the case of the Stewart Mining Com-

pany vs. Jonathan Bourne, Jr., et ux, which is now before this court on appeal, and in view of the fact that the lower court denied the claim of appellant to an extralateral right in this case for the reasons stated in the opinion in the case against Jonathan Bourne and wife, we refer to the brief for appellant in that case for a discussion of the facts and of the law applicable to same.

Respectfully submitted,

C. S. THOMAS,
CULLEN, LEE & MATTHEWS,
and GUNN, RASCH & HALL,
Solicitors for Appellant.

